No. 476

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

BRYANT McQUILLEN ET AL,
Petitioners,

AGAINST

THE NATIONAL CASH REGISTER CO. ET ALS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT OF SAME.

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TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Applicants (plaintiffs) respectfully present this application for a writ of certiorari to the C.C.A. (4) to review its final judgment entered June 11, 40, affirming final decrees entered by Coleman, J. in the D. C. of Md. (Md. Ct.), Jan. 11 39 and July 13, 39, dismissing amended bill of complaint drawn and filed by defendants (not plaintiffs) on June 30, 38, pursuant to and as limited by his orders entered respectively Jan. 7, July 1, 36; June 16, 37; June 30, 38. (Appellants' appendix (Apx. 57)). Appeal embraced all previous adverse interlocutory orders, decrees and decisions, entered by Md. Ct.

OPINIONS BELOW.

1st opinion of Md. Ct. 13 F.S. 53 was filed Dec. 14, 35 (about 11 months after hearing). 2nd opinion, Md. Ct. (oral) given July 14, 36, appears apx. p. 75. 3rd opinion, Md. Ct. 22 F.S. 867 was filed Mar. 17, 38, apx. p. 80, Md. ct's order Nov. 10, 38, apx. p. 98. Opinion C.C.A. (4) filed June 10, 30, is in 112 F (2) 877.

JURISDICTION.

C. C. A. judgement was entered June 11, 40. This court extended time for filing this application to and including Sept. 30, 40. Jurisdiction is founded on J. C. s. 240 (a), amended Feb. 13, 25 (28 U.S.C. s. 347, 350).

STATUTES AND RULES INVOLVED.

J.C. s. 57, 28 U.S.C. s. 118; Eq. R. 27, 38; Md. Corp. Laws, Art. 23, sections 23, 28, 29, 30, 31, 32 (1-7, incl.)

STATEMENT.

1st bill was filled July 5, 34, and amended bill Feb. 4, 35. Plaintiffs sued in good faith as minority stockholders for benefit of National Cash Register Company (NCR) a Md. corporation, organized Jan. 26 and in behalf of all A shareholders. They acquired their 100 A preferred shares June 20, 28 for $8,000. Their present value is $1,600. In 29 the total market value of all outstanding 1,190,000 A shares was $175,000,000. In 32 it was about $10,000,000. There is no issue in respect to demand under Eq. R. 27. Jurisdiction was founded on J.C. s. 57. In 26 NCR acquired all assets of its predecessor of same name, an Ohio corporation, which was dominated and controlled by defendants, F. B. Patterson, Barringer, Steffey, Allyn, Kuhns (referred to as managers of Ohio corporation and NCR). It had outstanding 96,710 7% cumulative $100 preferred and 90,000 $100 common shares. All individual defendants were non-residents of Md. Managers and Dillon Read Co. (DR) organized NCR which they dominated, with unissued capital of 1,100,000 (increased in 29 to 1,190,000) no par A with preferential cumulative dividends of $3 and 400,000 B shares entitled to $3 non-cumulative dividends, both classes sharing further dividends as shares of one class. Upon dissolution or distribution A and B shared assets as holders of

one class. B, until default of 2 quarterly A dividends elected majority of directors. After default both classes as one class, elected directors. When accumulations were paid and NCR earned equivalent of one year's A dividends, B could resume control. F. B. Patterson was president and director continuously after organization of NCR, Barringer was V. P. and director until 31, Steffey was director and sales manager until 31, Haswell, Hartman, Allyn and Kuhns were directors continuously after organization. R. D. Patterson, relative of F. B., was director continuously after 31. Behr, DR's employee and its representative, served as director continuously after 27. Phillips, DR's partner and its representative, served as director from 31 to 33. Bennett, V.P. or Irving Trust Co., served as director continuously after 26. McCain, pres. of Chase Natl. Bank, served as director continuously after 32. Deeds, close business associate of Rentschler, a director of Natl. City Bank of which Rentschler was president, served as chairman and director of NCR continuously after Apr. 31. Rentschler served as director continuously after 31. (13 F.S. 53) All B shares were issued to, owned or dominated and controlled by managers and DR. They managed and controlled NCR's business continually from its organization, and elected other directors. F. B. Patterson, his family and Farhills Co., a corporation which he owned, held majority of B shares. In Jan. 26, 150,000 B were transferred by managers, James and DR to a bank and later to NCR in trust for benefit of NCR's officers, directors and employees to be awarded them for future services to NCR in addition to salaries. (Apx. 101, 103, 109).

Though bills allege a conspiracy among individual defendants to deplete NCR's assets and to injure A holders by many illegal and fraudulent devices for their substantial benefit and sought relief in rem and in personam for all wrongful acts committed pursuant thereto, plaintiffs also

sought separately, relief for each wrongful act. (112 F (2) @880) (Apx. 1–56)

Pursuant to the conspiracy, they committed, among others, following wrongs: In Dec. 25 managers and DR caused Ohio Co. to retire all its preferred. Simultaneously they secretly obtained options to purchase all its common for $26,000,000. Simultaneously they organized, controlled and became sole officers and directors of NCR. At the same time, they, as NCR's agents and trustees, put out for subscription and sale for NCR's benefit all its 1,100,000 authorized but unissued A, which public bought for $55,000,000 in the belief that their subscriptions were being paid to NCR. After defendants collected this fund, property of NCR, they secretly converted it to their use. With $26,-000,000 of its funds, they wrongfully, in their own names, took up options on Ohio common, pretending they were their property. They then secretly and fraudulently caused Ohio Co.'s assets to be transferred to NCR and simultaneously caused latter fraudulently to issue to managers, DR and James all NCR's A shares which they wrongfully converted and simultaneously caused NCR in lieu or in exchange thereof to issue A shares to subscribers, concealing their wrongful acts and causing subscribers to believe that shares they were receiving were issued to them by NCR. No part of A shares was bought by defendants, or ever paid for with their money. Simultaneously, as they wrongfully planned to do, they converted and divided between them the remaining $29,000,000 which they held as trustees for NCR, of which managers converted $14,000,000, DR and James $15,-000,000 which they hold as trustees for NCR's benefit. They simultaneously and illegally issued to themselves NCR's unissued 400,000 B for which they paid nothing to NCR, which they also secretly divided, Patterson converting majority, Barringer, Allyn, James and Dr the balance. As part of scheme, by contributions made by each conspirator,

they simultaneously conveyed 150,000 of these B shares (out of 400,000 B) first to banks and later to NCR in trust for NCR's unnamed and uncertain officers, directors and employees, for transfer to them from time to time for services to be rendered, in addition to adequate salaries, NCR's officers determining amount they should receive. Though defendants coerced NCR to issue these shares, as aforesaid, for which they should have paid profit income tax of $678,375, they wrongfully and secretly coerced NCR to pay it. Patterson and DR retained the voting rights. Between 26 and 30 defendants coerced NCR to distribute 45,000 B, defendants Kuhns, Steffey and Hartman receiving several thousand in addition to illegal and excessive salaries voted to themselves. NCR has since held remaining 105,000 B and has obtained dividends on them (Apx. p. 296, 297; NCR. v. U.S. 10 F.S. 685,689, which reveals transaction). Up to 31 NCR paid all B holder $6,200,000 dividends of which Patterson received $3,200,000, Barringer and Allyn, each $253,870, other defendant officers or managers participating substantially in addition to excessive salaries (apx. 55), (Apx. 13, 26) (See An. Rep. 30, 31, 34 to 37; 10 F.S. 685). Plaintiffs sought accounting for their conversion of the $29,000,000 to establish it as a trust fund for NCR's benefit, including dividends paid on B, cancellation of illegally issued 400,000 B, including 150,000 B, or alternative relief. (Apx. 1, pars. 12, 13, 14; 13 F. S. 53; Apx. 82)

They alleged as part of conspiracy, that between Jan. 1, 30 and Jan. 1, 33, $7,000,000 A dividends accumulated. B likewise received no dividends. B holders notwithstanding default, as part of conspiracy continued as officers and directors and controlled NCR. During depression, 30 to 36 (see Ann. Reps. apx) NCR suffered substantially decreased earnings and losses. Its substantial uninvested surplus was wiped out and its capital impaired by nearly $5,000,000 in 32. (Ann. Rep. 30-33 incl.) (Apx. p. 128)). Be-

cause of defaults, A holding majority was entitled to elect efficient officers and directors, to oust B from control and thereby prevent the waste, illegal acts, excessive salaries, conversions which had occurred and to obtain relief from managers, DR, Deeds and others for past grievances upon discovery of these wrongs which defendants concealed. Anticipating this, knowing that A dividends must indefinitely accumulate annually by $3,600,000, that NCR's business outlook was dark, that A accumulations could never be paid, that their B shares were valueless, and that they had lost control and the opportunity to obtain the improper advantages they had theretofore obtained, defendants, beginning with 31 and through 32, fraudulently brought about a situation by which they would retain the improper advantages, and deprive A holders of their rights. To accomplish this, they coerced, by illegal and fraudulent means, NCR to exchange all B of which they were the owners or trustees (which they concealed from A holders) for 200,000 illegally created C shares having same rights and preferences as A, coerced NCR to deprive A of their large accumulated and future preferential dividends, misappropriated all its surplus available for A dividends to their own use, deprived A of their contractual, vested, statutory and constitutional rights, coerced NCR to issue and fraudulently coerced numbers of A holders to accept in lieu of such dividends which they were entitled to receive in cash, 238,000 A shares which they illegally coerced NCR to issue, coerced it to divide among B holders under the guise of dividends, property and funds of NCR, contributed wholly by and belonging to A holders, deprived A holders of the control to which they were entitled, wrongfully continued such control in themselves, and together with the other defendants, continued as they had done for many years to misappropriate and waste NCR's assets and property, to the great injury of A holders. By illegal acts, concealments, failure to make ful

disclosures, breaches of fiduciary duty in their own interests, they prevented recovery for the wrongs complained of. (112 F (2) @ 880, apx. 7, 63, 14, 16, 18, 20, 24). They consummated the fraudulent, illegal 32 reorganization, continued payments of illegal and excessive salaries to themselves and as part of scheme coerced NCR to pay to DR and to its partner directors of NCR, a bribe of $65,000 for their work in persuading A holders (to whom they had sold practically all A shares) to adopt the reorganization. (apx. p. 178) (Ann. Rep. 31, 32.)

As part of the 32 reorganization and to enable defendants to improperly pay dividends on their illegally exchanged shares, they wrongfully created a fictitious surplus of more than $7,000,000 out of the capital as it stood before the reorganization by arbitrarily and illegally reducing capital by $17,000,000. (Ann. Rep. 32–37). They illegally filed with the Md. Tax Commissioner unauthorized and false certificates, reducing, not the capital, but reducing the capital stock, see notice (apx. 325) apx. 334, 104)) and illegally procured from the Commissioner authority for such reduction of capital stock and authority to amend NCR's charter for the issuance of the 238,000 A and the 200,000 C. Such amendments wrongfully certified, under oath of Kuhns and Allyn, that 2/3rds of each class of shares had authorized amendments though only 2/3rds of all A and B holders as a single class, including B shares secretly held by managers, assented thereto. (112 F (2) @ 883) (apx. 102, 105, 113, 325, 332, 334, 337, 345; Ann. Rep. 30–37 inc. apx.) As part of same conspiracy, to accomplish such illegal reorganization and to obtain for themselves the illegal and improper advantages thereunder, obtaining for their valueless B, C shares having value of A, managers, with the advice and consent of Rentschler, and with his and other directors' aid, and when NCR was suffering great losses as it did from 30–36 inc., A dividends having accumulated by many mil-

lions, well knowing that the depression had seriously affected NCR's business, they illegally coerced NCR in 31 to retain Deeds as its chairman and director, B holders by their control, electing him a B director, and coerced NCR to illegally employ its assets and capital for Deeds' and their own benefit in the acquisition of 60,000 A at about $8 per share, and illegally and improperly gave Deeds, in addition to his inordinate and never earned salary of $100,000 yearly, a 5 yr. option in Sept. 32 to purchase such A shares at cost to NCR, with interest at 4 per cent after deducting dividends, well knowing that such shares were intrinsically worth greatly in excess thereof, which shares Deeds took up from time to time with funds he illegally received under the guise of salary profiting, in addition to his salary, about $2,000,000, such shares having risen to $38 per share; that he never earned such salary or benefits from the option since during and under his management, NCR suffered great losses, dividends on A accumulated by many millions, since Deeds, in consideration thereof, actively participated and aided in the wrongful 32 reorganization and in the wrongful acts by which it was consummated. Though he agreed to devote all his time to NCR's business, he devoted only 3 or 4 days a week thereto. During such period he secretly received from 2 other corporations of which he was president, General Sugar Co. which was in receivership and in which National City Bank was interested and Niles Bement Co., a salary of $86,000 annually; that the salary which he received from NCR and the terms and reason for the option, the large profits he received thereby and the employment and salary which he received from the other corporations and the wrongful acts committed by him in connection with and growing out of the reorganization, including the reason for his employment, he and the other defendants concealed from shareholders until after the filing of the suit; that important, material facts were

concealed from them for a long time thereafter; that shareholders never gave their consent to the Deeds' transaction, by vote or otherwise, never approved any of the wrongful acts and never gave their approval, as required by Md. law, to the 32 reorganization, defendants improperly concealing their wrongful acts and failing to make full disclosure, as they were required to do. (apx. 113–129; 230; 231; see Cong. Record, Vol. 67, part 1, pp. 887, 893, 894, 900–914; apx. 262, 265, 178, 168, 169, 307; see Ann. Rep. attached to app. 30–37; apx. 113, 119, 120; Ex. A. p. 129, 128, 127, 125, 129).

Plaintiffs sought recovery from defendants of salaries because of their fraud, for breaches of fiduciary duties, for sums paid in excess of fair value of services (apx. p. 55, Ex. A, p. 54) for cancellation of 32 reorganization and action taken thereunder, for cancellation of Deeds' option, for recovery of dividends and payments to Deeds, or alternatively, relief as to matters stated in rem, recovery of the $5,000,000 wasted in Ellis Co. transaction and injunctions to restrain wrongful acts, including payment of dividends, excessive salaries and voting illegally issued shares. (Oral op. and Mar. 17, 38, apx. p. 80; op. May 4, 39, apx. pp. 1–57.)

PROCEEDINGS IN MD. CT. AND C. C. A. (4).

Feb. 35, Md. Ct. heard motion for substituted service which NCR unsuccessfully resisted on jurisdictional grounds. Dec. 14, 35, (13 F.S. 53) it ordered service on those subsequently appearing specially, DR, Patterson and Allyn, refusing it as to other officers and directors, whom applicants urge were necessary if not indispensable parties. Feb. 1, 36, defendants, except DR, Patterson and Steffey, appeared specially and moved to quash service on jurisdictional grounds which court denied June 25, 36. July 1, 36, still appearing specially, defendants moved limiting proceedings to matters in rem and striking matters in personam and alternative relief in rem. By his oral opinion

July 14, 36, relying upon J.C. s. 57, Md. Ct. granted their motion. (apx. 75) striking averments for recovery of $29,000,000 or following this as a trust fund including salaries which defendants voted themselves, sums in excess of fair value of their salaries, dividends illegally paid on all B, recovery for waste of $5,000,000 overpaid in acquisition of Ellis Typewriter Co., all alternative relief in rem, limiting relief strictly to cancellation of illegally issued 238,000 A, 200,000 C. June 25, 37, still appearing specially, defendants moved to dismiss bill or strike transactions relating to illegal issuance of all B and transfer of B to NCR as trustee, alleging these occurred before June 20, 28, when plaintiffs acquired their A shares and that under Eq. r. 27, court could not entertain these grievances. In same motion, they moved to strike averments respecting issuance of 238,000 A, to all A holders in lieu of accumulated and future preferred dividends and all other rights, on the ground of nonjoinder as indispensable parties of all A holders. Court granted their motion, first under Eq. r. 27 and second, because of nonjoinder, holding that neither plaintiffs or NCR represented A or their interests. (apx. 87, 89). By these many motions bill was shorn of its most important grievances and prevented proof of conspiracy, court on Nov. 10, 38 having ruled out inquiry into stricken transactions as proof of conspiracy of those retained. Md. Ct. retained bill as to what remained of 32 reorganization, i.e. cancellation of 200,000 C shares and exchange thereof for 400,000 B, and cancellation of Deeds' option. (apx. 80–98 inc. 22 FS. 867) (apx. 79).

Though Md. Ct. made no order requiring plaintiffs to file new amended bill, June 30, 38 it ordered defendants over plaintiffs' objection, to file amended bill drawn by defendants, limiting averments to these two transactions (apx. 56). Aug. 38 defendants still appearing specially, answered, substantially admitting averments as to these transactions but

denying fraud, conspiracy, illegality, violation of Md. laws or NCR's charter, concealments, failure to disclose, or any unfairness, or inequities Deeds averred under oath that officers and directors, when he was retained in 31, agreed that he should receive additional compensation by way of profit sharing or option to acquire shares if NCR's business proved successful under his management. (Deeds' answer).

Nov. 10, 38 (apx. 79) Md. Ct. ordered on defendants' motion, that depositions be limited strictly to defendants' bill and that without limitation there should be no inquiry into matters stricken by court's order because they were unrelated to matters retained. Jan. 39, Md. Ct. tried suit. May 4, 39 it filed opinion dismissing bill. (apx. 98, 27 F.S. 639). From final decree and all previous adverse orders plaintiffs duly appealed to C.C.A. (4). Apr. 16, 40 appeal was argued. June 10, 40, C.C.A (4) filed its opinion affirming Md. Ct. as to all its orders, decisions and final decree. (112 F (2) 877) Judgment was entered June 11, 40.

Under "QUESTIONS PRESENTED" herein, applicants have partly stated rulings in which both courts erred. Though they held that there was no fraud, conspiracy or illegality, applicants assert that their conclusions were erroneous. They also assert that on courts' findings of facts, excluding or including averments in their bill, truth of which was admitted by their several motions (10 F.S. 75) and on undisputed evidence which they failed to consider, erroneous rulings of law which they made, that both courts erred. Applicants have stated below only grounds for this application.

QUESTIONS PRESENTED.

1. Did C.C.A. err in affirming order permitting defendants to appear specially and in granting their motion striking all matters in personam, all alternative relief in matters in rem on the ground that under J. C. s. 57, Md. Ct. had no jurisdiction to grant such relief? (112 F. (2) 877, par. 3, 4, 5).

2. Did C.C.A. err in affirming ruling permitting defendants to appear specially and in granting their motion to strike averments as to illegal issuance of 400,000 B and 150,000 B (in Jan. 26) because under Eq. R. 27 plaintiffs could not complain of wrongs occurring before they became shareholders (June, 28)? (112 F (2) @ 881, 882, 883, pars. 5, 6, 7–10 inc.).

3. Did C.C.A. err in affirming order granting their same motion striking averments as to issuance of 238,000 A shares to holders of the 1,190,000 A shares on the ground of nonjoinder of latter or their transferees as indispensable parties? (112 F (2) @ 881, pars. 3, 4, 5, p. 882, pars. 6, 7, 9.)

4. Did C. C. A. err in affirming order made Nov. 10, 38 limiting scope of plaintiffs' inquiry strictly to relief sought by (defendants') amended bill and ordering that plaintiffs should not inquire into the 26 transaction, as to the issuance, sale or distribution of the A shares, conversion of proceeds by defendants from such sale or as to illegal issuance to themselves of 400,000 B shares, or into any matters stricken? (112 F (2) @ 882, par. 10; apx. 79).

5. Did C. C. A. err in affirming ruling holding that such part of the 32 reorganization as was retained and all acts taken to consummate the same were legal, proper and in accordance with Md. laws and NCR's charter? (112 F. (2) p. 883).

6. Did C. C. A. err in affirming ruling that the Deeds' option was legal, proper, founded in good consideration and that he was entitled thereto in addition to his salary? (112 F. (2) @ 884, par. 16).

SPECIFICATIONS OF ERRORS TO BE URGED.

1. It is unnecessary to repeat here as errors those set forth in "QUESTIONS PRESENTED", all of which will be urged.

If writ is granted, applicants will urge as further errors the following:

2. All C.C.A. rulings affirming orders and decrees of Md. Ct.

3. Affirming order refusing substituted service on defendants, Phillips, Behr, Haswell, Bennett, R. D. Patterson, McCain and Rentschler, all directors of NCR, on the ground that they were necessary, if not indispensable parties. (112 F (2) 881).

4. Affirming order of June 16, 36 striking from final decree entered Apr. 3, 36, that part which ordered defendants Patterson and Steffey to surrender certificates of illegally issued 400,000 B in lieu of 200,000 C or common shares? (see cert. man. denied, 303 U.S. 637, 93 F (2) 1009, Doc. 637).

5. Affirming decision of May 4, 39 and final decree (apx. p. 98) holding that neither 32 reorganization or Deeds' option were fraudulent or were consummated illegally and improperly.

6. Lower courts should have held as a matter of law upon their findings, and/or upon uncontradicted and undisputed facts, which they failed to consider and/or on evidence excluded by court's order, that both transactions were illegal, fraudulent, consummated pursuant to the conspiracy and in violation of their fiduciary duties.

7. Lower courts having erroneously applied or misinter-

preted authorities as supporting their decisions, they erred in entering all orders adverse to plaintiffs and in dismissing bill.

REASONS FOR ALLOWANCE OF WRIT.

1. C.C.A's decision conflicts with decisions of other C.C.A.s and district courts on the same matter, with weight of authority, misinterprets s. 57 and erroneously limits jurisdiction of federal courts strictly to matters in rem.

2. C.C.A.'s decision limiting relief under Eq. r. 27 to transactions occurring after plaintiffs became shareholders conflicts with decision of other C.C.A.s and district courts on the same matter, with Md. decisions, with weight of authority and is in apparent conflict with decisions of Supreme Court.

3. C.C.A.'s decision striking averments respecting illegal issuance of 238,000 A shares, conflicts with decisions of other C.C.A.s and federal and Md. courts, with weight of authority and is in apparent conflict with decisions of this court.

4. C.C.A.'s decision limiting inquiry to matters stated in defendants' bill and forbidding inquiry into matters stricken, conflicts with decisions in other C.C.A.s and federal courts, with weight of authority and is in apparent conflict with decisions of this court.

5. C.C.A.'s decision as to 32 reorganization holding that it was in compliance with Md. laws and NCR's charter, conflicts with Md. decisions and law, decisions in other federal courts, with weight of authority, and deprived A holders of constitutional rights.

6. C.C.A.'s decision that Deeds' option was proper, conflicted with Md. decisions, decisions cited by it, with weight of authority and with decisions of this court.

7. There is no decision by this court which settles or determines the law on the vital and important issues here.

These questions frequently arise and imperative necessity requires that this court shall settle them, more especially as to 1, 2, 3, 5. Reasons and argument are stated in appellants' brief.

PRAYER FOR WRIT

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari to the CCA for the 4th Circuit should be granted.

Respectfully submitted,

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APPLICANTS BRIEF IN SUPPORT OF REASONS FOR GRANTING WRIT.

1. STRIKING AVERMENTS IN PERSONAM CONFLICTS WITH DECISIONS IN OTHER FED. COURTS. MD. COURT HAD JURISDICTION TO DISPOSE OF ALL CONTROVERSIES IN PERSONAM AND IN REM.

Lower courts erred in permitting defendants to appear specially and in holding that they had no jurisdiction under s. 57 to grant relief in personam or alternative relief in rem. In *Bede Co.* v. *N. Y. Co.* 54 F (2) 658, defendants filed special appearance and claimed that court had no jurisdiction to grant relief in personam. It held that appearance did not question jurisdiction, that it was general and that it had jurisdiction to grant relief in all matters in personam and in rem. By declining to follow Bede case, C.C.A.'s decision raised a direct conflict. It also appears to conflict with *McQuillen* v. *DR,* 98 F (2) 726, where C.C.A. (2) held in a suit brought in S.D. of N.Y. to aid in enforcing Md. court's final decree of Apr. 3, 36 to require DR to return certificates for 400,000 B shares or to obtain alternative relief, the lower court having denied relief on the ground the decree sought to be enforced was in personam, that though it sustained lower court's conclusion it did not do so, on the ground stated by lower court, but on the ground that Md. bill upon which the final decree against DR was predicated contained no allegation that DR owned B shares when the suit was brought and therefore had no jurisdiction to entertain the suit or enter this decree. Inferentially, it seems to hold that if bill had contained such allegation that N.Y. Fed. courts would have had jurisdiction to enforce Md. decree. The decision appears to be in direct conflict also with *Harvey* v. *Harvey,* 290 F. 653. It also conflicts with *Ky. Co.* v. *Mineral Co.* 219 F. 45, 46. Also, with

Jellinick v. *Huron Co.* 177 U.S. 1 (leading case) (similar to bill here) where court retained jurisdiction under s. 57 notwithstanding bill alleged grievances in personam. Likewise, it appears to be in conflict with *Hodgman* v. *Atlantic Co.* 274 F. 144, Del. D. C. There court held it had jurisdiction under s. 57 denying motion to dismiss, because bill (like bill here) sought recovery in personam and alternative relief in rem. In same case 300 F. 590 (overruled on other grounds) alternative was granted.

Decision also appears to be in conflict with Coleman J's decision in 13 F.S. 53 and with principles in *Alexander* v. *Hillman* 296 U.S. 222; *Ferguson* v. *Babcock Co.* 252 F. 705; *Franz* v. *Buder* 11 F (2) 854; *Independent Co.* v. *U. S.* 274 U.S. 640, 647; *U. S.* v. *Dunn* 268 U.S. 121; *Root* v. *Woolworth Co.* 150 U.S. 401; *Greeley* v. *Lowe* 155 U.S. 58; *Shield* v. *Thomas* 18 How. 253, 261; *McCandless* v. *Furloud* 296 U.S. 140; *Blackmer* v. *U. S.* 284 U.S. 421, 435; *Hudson* v. *Murray* 231 F. 419; *Holmes* v. *Camp* 219 N.Y. 359; *Ingersoll* v. *Coram* 136 F. 689; *Hillman* v. *U. S.* 296 U.S. 222; *Clark* v. *Boysen* 39 F. (2) 800, 13, 15, 22 (cert. den); *Ferdig Co.* v. *Wilson* 91 F. (2) 857, 60; *Spellman* v. *Sullivan* 43 F. (2) 762; *Thompson* v. *Terminal Shares* 89 F. (2) 652, 5, 7; *Carney* v. *Oil and Gas Co.* 5 F.S. 304; *Dana* v. *Searight* 47 F (2) 38 (cert. den 283 U.S. 856); *Virginia* v. *System* Fed. 300 U.S. 515; *Rogers* v. *Guaranty Co.* 288 U.S. 123; *Rogers* v. *Hill* 289 U.S. 582; *Lamb* v. *Kramer* 285 U.S. 217; *Chandler* v. *Bacon* 30 F. 538; *O. D. Co.* v. *Bigelow* 203 Mass. 159, 218; *Continental Bank* v. *C. R. I.* 294 U.S. 648; *Employers' Co.* v. *Bryant* 299 U.S. 373, 7; *Aetna* v. *Hayworth* 300 U.S. 227, 9, 30.

Md. court also had equity jurisdiction to dispose of all controversies especially those intertwined with or intimately related to matters retained. Defendants' issuance of B was part of conversion of $29,000,000, related to illegal issuances and exchanges of 200,000 C. and 238,000 B and 32

reorganization which were intertwined with Deeds' employment and option. Grievances involved abuses of Fiduciary duty resulting from control through ownership of all B shares which enabled them to use NCR's structure and property wrongfully. Hearing on any one transaction, if evidence was admitted on wide latitude it should have been, involved hearing of all grievances. There is no reason why all of them could not be disposed of together. *Peterson* v. *Hopson* Mass. Ad. Sh. Sept. 17, 40, 1389, 1396 *et seq.*

Suits in personam under s. 51 which must be brought in jurisdiction of defendants' residence, are for their convenience and are not their absolute right. By appearance in Md., to defend any part of bill on the merits, defendants could suffer no inconvenience. If Congress intended to exclude from s. 57 any related in personam matters, it would have so provided, but s. 57 clearly intended that if defendants appeared to defend any part of bill, their appearance was general and that court would have jurisdiction for all purposes. They could have refused to appear whereupon courts would be limited to relief strictly in rem under s. 57, but s. 57 intended and appears to have provided for all relief sought by bill upon any appearance to contest any part of suit. Their powers then broadened, they of necessity had the jurisdiction over parties by their appearances.

Pennoyer v. *Neff,* 95 U.S. 714, erroneously cited by lower courts as an authority has no pertinency. There, suit was brought under s. 51, not s. 57. The non-resident defendant who had the right to be sued where he resided appeared specially to protect property attached in another jurisdiction. No case has been cited or found. Certainly there is no Supreme Court decision which sustains decision below.

Lower courts erroneously relied on *Grable* v. *Killits,* 282 F. 185 (CCA 6). There, though bill in part came under s. 57, defendants were not served on order for substituted

service thereunder, as lower courts here erroneously assumed. Defendants never appeared under s. 57 and did not seek to quash any service thereunder, nor did the court take jurisdiction under s. 57. It issued an order on nonresident defendants to show cause why a receiver should not be appointed over defendants' property outside its jurisdiction. One part of the suit sought liens and cancellation. The other part sought affirmance of same transaction and damages. On the order to show cause, defendants appeared specially to quash service, claiming that court had no jurisdiction to issue or to bring them in under such order. C.C.A. overruled lower court's decision, granting motion to quash. Grable case did not hold that where nonresidents appeared specially upon substituted service under s. 57 that they could have stricken matters in personam. The Bede and Harvey cases were decided after Grable case. Neither case even mentioned it. The Ky. Co. case was decided by same court. It does not mention either Jellinick or the Ky. Co. cases. It is deducible from Grable case that courts would not have sanctioned special appearances under s. 57, or stricken from bill any averments, a fortiori where they related to parts retained. They did not strike in personam averments.

The Grable case is authority for plaintiffs. The decision there is in conflict with decisions here. *Irwin* v. *Quintanelta,* 99 F (2) 935; *Woodside* v. *U. S.* (CCA 4) 60 F (2) 823.

Moreover, defendants were fiduciaries, holding as res the misappropriated funds, title to which was in NCR. This res was located as much in Md. as anywhere and thereby vested jurisdiction in Md. Ct. *Spellman* v. *Sullivan,* 43 F (2) 762, *Dahlgren* v. *Pierce,* 263 F. 841; *Franz* v. *Buder,* 11 F (2) 854, 8.

2. LIMITING RELIEF UNDER EQ. R. 27 TO TRANSACTIONS WHICH OCCURRED AFTER PLAINTIFFS BECAME SHAREHOLDERS CONFLICTS WITH OTHER MD. STATE AND ENGLISH DECISIONS IS OPPOSED TO WEIGHT OF AUTHORITY AND APPARENTLY TO DECISIONS OF THIS COURT.

C.C.A. stated that there were conflicts between its decision and decisions of some state and English courts (112 F (2) 882). It cited as leading cases opposed to its view, *Pollitz* v. *Gould* 202 N.Y. 11; *Seton* v. *Grant* L.R. (1867) 2 Ch. App. 459). Other English cases opposed to C.C.A. decision are *Bloxas* v. *Met Co.* L.R. 3 Cr. App. (1868) 353; *Potter* v. *M. Co.* L.R. 38 Cha. App. Div. 92, 96; *Nat. Bk. In re:* L.R. Ch. Div. 2 (1899) 629; *Forrest* v. *M & S Co.* 45 Eng. Rep. 1131, 1173; *Filder* v. *London,* L.L. B. & So. 61 Eng. Rep. 214, 216. C.C.A. decisions conflicts with *Hand* v. *Kan. Co.* 55 F (2) 712, 714, which held that plaintiff need not be shareholder when suit was brought, citing *Ball* v. *Rutland* 93 F. 513; *Lindsley* v. *Natural Co.* (N.Y.) 162 F. 954; *Kelly* v. *Dolan* 218 F. 966; *Ogden* v. *Gilt Co.* 225 F. 723, which held that R. 27 is not jurisdictional and that requirements for certain preliminary steps by stockholders before suing will be dispensed with where interests of directors are antagonistic.

In *Jacobson* v. *G. M. Co.* 22 F.S. 255, Judge Knox reached a decision contrary to the Hand case, citing as supporting his conclusion, *Venner* v. *G. N. Co.* 153 F. 408, and *Hitchings* v. *Cobalt Co.* 189 F. 241. The Hitchings case was removed from state to the federal court and was decided prior to Pollitz case. Judge Knox did not follow the Hitchings in the Hand case, nor did he follow the Hand case in the Jacobson case, though one of the actions in the Jacobson case was removed by defendants from state to the federal court. The Hitchings case conflicts with Pollitz case and also with *Jabor* v. *Agnew* S.D.N.Y. Jan. 5, 40, which held that where case was removed from State to federal court in N.Y. plain-

tiffs could complain of grievances prior to his becoming shareholder, citing Lindsley and Hand cases. In the Jacobson case, Judge Knox held that there should be one authoritative decision by this court which would clear up the distinctions and conflicts arising under some decisions and R. 27, now C.P.R. 23.

C.C.A. referred to *Krous* v. *Brevard Co.* CCA (4) 1918, 249 F. 538, 543, not in support of its decision for it appears to be in conflict with it. It held that while the underlying thought for the basis of R. 27 was well understood, its application was dependent upon facts in each case, was given practical operation and such play as fits the condition of different cases, citing *D & H Co.* v. *A & S Co.* 213 U.S. 435.

C.C.A. here cited not as authorities in support of its conclusion, *Dimpfell* v. *Ohio,* 110 U.S. 209; *Corbus* v. *Alaska Co.* 187 U.S. 455; *Venner* v. *Great Co.* 209 U.S. 24; *Quincy* v. *Steele,* 120 U.S. 467. They do not even remotely support its conclusion. Other courts have erroneously referred to these cases as if supporting the proposition that plaintiffs must have been shareholders when grievances complained of were committed. These cases not only do not support such conclusion but the reasoning in them and in many other C.C.A. and district court cases are opposed to such conclusion and demonstrate that the single purpose of R. 27 as explained in *Hawes* v. *Oakland* 104 U.S. 450 and in these cases was exclusively to prevent collusive suits being brought in federal courts and not to change substantive rule. *Am. Works* v. *Powell,* 298 F. 417, 420; *D & H Co.* v. *A & S Co.,* 213 U.S. 435; *Doctor* v. *Harrington,* 196 U.S. 579; *Price* v. *Union Co.,* 187 F. 866. In the Venner case the only question decided was a jurisdictional one, as to whether there was the requisite diversity of citizenship.

It is apparent that the decisions in this court appeared to have raised conflicts, that they have been misinterpreted and misunderstood by some of the lower courts and by the

C.C.A. (4); that there are conflicts between decisions of lower federal courts and the state and English decisions. This should be cleared up by an authorative decision by this court which shall settle any conflicts. The same conflicts have arisen under C.P.R. 23.

C.C.A. erroneously stated that the Md. doctrine, citing *Matthews* v. *Headley Co.* 113 Md. 523, 532, 534, 100 A 645, was in line with its conclusions. There, suit was brought by a corporation to recover excessive salaries. The management acquired control from defendants. It held that recovery would enable them to receive back, through the corporation, more than the stock cost them; that they were bound by defendants' acts, that they received what was represented and what they bought and that suing through the corporation was a guise to obtain improper advantages. This was the sole basis for that decision. It held that nonconsenting minority might recover the excesses in their own interests.

Dictum reference was made to R. 27 which by no means held as C.C.A. stated. It did not decide that no recovery could be had by stockholders because they did not own shares at time of grievances. *Eshleman* v. *Keenan,* 187 A. 25, 27 (1936), 2 A. (2) 904, discussing *Matthews* case, held that it was peculiar and that its decision was limited as above stated. Md. Law Rev. 1940, Vol. 4, 380, 391, discusses the question as to whether stockholders are prevented in Md. from suing for wrongs committed by directors before they became shareholders. It showed convincingly by many authorities that under Md. law, following the best and most popular view, that they were not prevented and that Matthews case did not hold that they were prevented. It demonstrated that the prevailing rule in England and 13 other states where question arose was that stockholders could sue for prior wrongs committed.

In *Peterson* v. *Hopson,* decided by Mass. Sup. Ct. Ad. Sh.

Sept. 14, 40 1389, held that plaintiffs need not be shareholders when grievances occurred and that the weight of authority entitles them to complain of all directors' and officers' wrongdoings, their misappropriations being corporate property in which all shareholders are interested, citing *Pollitz* case, *Seasongood,* 21 Harv. L.R. 195, Cook Corp. Ed. 8, 23, s. 736, 737, Fletcher Cyc. Corp. Rev. Ed. 32, s. 5980, 5981; Scott Trusts, s. 297 (a) 282.4, 294.2-295.1; *Greer Co.* v. *Booth,* 62 F (2) 321.

3. C.C.A. DECISION AFFIRMING ORDER STRIKING AVERMENTS AS TO ISSUANCE OF 238,000 A SHARES CONFLICTS WITH DECISION OF THIS COURT OR WITH OTHER C.C.A.s, IS OPPOSED TO WEIGHT OF AUTHORITY AND IS NOT SUPPORTED BY AUTHORITIES CITED.

Examination of cases cited by Md. Ct. (apx. 90) do not sustain its conclusion. On the contrary, they are either opposed or have no bearing. Lower courts' decision seem to be in conflict. *American Co.* v. *Drawmakers,* 90 F. 598; *Carson* v. *Alleghany Co.* 189 F. 791, 804; *Hawes* v. *Oakland,* 104 U.S. 461; *Doane* v. *Consolidated Corp.* 271 F. 12, *Christopher* v. *Brusselback,* 302 U.S. 500; *Widenfelt* v. *N. P. Ry.* 129 F. 305, 310. *Greer Co.* v. *Booth: Peterson* v. *Hopson. Magruder* v. *Drury,* 235 U.S. 106.

The decision conflicts with *Keller* v. *Wilson, Yoakum* v. *Biltmore Co.,* 34 F (2) 533; *Barkley* v. *Wabash Co.* 30 F (2) 260, 264, 5, 7; *Greenwood* v. *Freight Co.* 105 U.S. 13, 15; *Commerce Co.* v. *Chandler,* 295 F. 241, 243; *Coombes* v. *Goetz,* 285 U.S. 434; *Berslav* v. *N. Y. Q. Co.* 249 A.D. 181; *Looker* v. *Maynard,* 179 U.S. 46, 51; *Miller* v. *State,* 15 Wall. 478, 491. Particularly is it in conflict with *Alleghany Corp.* v. *Aldebrand Corp. and Tri-Contintental Corp.,* C.C. 2 of Balt. Md. (1937) Doc. Nos. 85, 86 which sought relief similar to that sought here, where plaintiffs sued for corporation in behalf of themselves and all other stockholders.

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Keller v. *Wilson,* 180 A. 584, app. 190 A. 115 is directly in conflict with decision here. The Del. Ct. denied a similar motion to dismiss a suit brought by a minority stockholder in behalf of himself and other shareholders, holding that the other shareholders affected were not indispensable parties and the plaintiff could establish rights for other shareholders similarly situated. The decision is in conflict with Coleman, J.'s decision in 13 F.S. 53, *Southern Co.* v. *Bogert,* 250 U.S. 483; *Harvey, Jellinick, Rogers* v. *Hill and Rogers* v. *Guaranty Co.* and a host of other decisions involving the same issues where the bill was brought by one shareholder for the benefit of all others and the corporation. Action taken here was as part of 32 reorganization. Thereby, NCR, by acts of defendants, created, without consideration, 238,000 new A shares and 200,000 C shares which increased the burdens of N.C.R. They were void shares, coerced upon NCR by illegal and fraudulent action of defendants. They never had any legal existence and this suit was brought to clear title to properly issued shares by removal of the illegal burdens. It purported to be accomplished by necessary statutory action. (Art. 23, s. 28, 29, 30, 31.) Only 58% of A purported to adopt the illegal resolution and the illegal changes. Minority B shares held by defendants (and this was concealed) coerced NCR to issue such illegal shares and coerced A holders to accept them. It was necessary as part of the relief to cancel the entire 32 reorganization and not a part of it, *i.e.* cancellation of the 200,000 C, and the 238,000 A in lieu of accumulated and all preferred dividends. It changed status of A holders from preferred to common. No new shares could be issued without action and vote of a required number of shares, whether it was a 2/3rds vote or a unanimous vote, but clearly such issuance could not divest A shareholders of at least their vested rights without the consent of all. Issuance of additional shares suspended possibility and size of dividends. The ruling defies com

mon sense, and all rules by which shareholders may establish their rights as against illegal action affecting their rights in the corporate entity. The joining of 19,000 holders of 1,190,000 A shares is as ludicrous as it is impossible and makes a travesty of justice.

4. LIMITING EVIDENCE TO TRANSACTIONS RETAINED AND FORBIDDING INQUIRY INTO MATTERS STRICKEN CONFLICTS WITH APPLICABLE DECISIONS IN ALL FEDERAL COURTS AND WITH WEIGHT OF AUTHORITY.

112 F (2) 883 C.C.A. stated that in the light of other rulings by Md. Ct. the ruling limiting the evidence as stated above was a proper exercise of Coleman, J.'s discretion. His Nov. 10, 38 order was not based upon discretion nor was any discretion permissible and if it was it was abused. C.C.A. also stated that by virtue of previous rulings, if Coleman, J. erred, no substantial harm resulted. To hold that in declining to consider evidence of other gross frauds committed by defendant officers and directors, among them converting $29,000,000 of NCR's funds and 400,000 B shares valued at $33.50 per share, and not considering the evidence based upon other similar wrongs committed by them, *i.e.* illegal or excessive salaries, as showing that they used their control for purposes of their own and in consummating the transactions complained of, is disregard of a host of federal and state cases which conflict with this conclusion, among them *Tilden* v. *Barbour,* 268 F. 587, 9, 606, 7, 8; *Irving Co.* v. *Deutsch,* 73 F (2) 121, 3; *Jackson* v. *Ludelling,* 21 Wall. 616; *Jackson* v. *Smith,* 254 U.S. 586, 8, 9; *Butler* v. *Watkins,* 13 Wall, 456, 464; *Big Spring Co.* v. *Kitzmiller,* 268 Pa. 34, 38; *Commonwealth* v. *Reading,* 204 Pa. 151; *Bailey* v. *Jacobs,* 325 Pa. 187; *N. E. Co.* v. *Reed,* 209 Mass. 556, 562; *Att. Gen.* v. *Pelletier,* 240 Mass. 265, 316; *Lantin* v. *Goodnow,* 207 Mass. 291; *Backus* v. *Finkelstein,* 23 F (2) 357; *Loft* v. *Guth,* 5 A. (2) 503; *Pollitz* v.

Wabash, 207 N.Y. 113; *U. S.* v. *Kissell,* 218 U.S. 601, 606; (2) 705; *Sutton* v. *Sutton,* 56 Md. 109. *Peterson* v. *Hopson, supra.*

5. C.C.A.'s DECISION HOLDING 32 REORGANIZATION COMPLIED WITH MD. LAWS AND NCR's CHARTER CONFLICTED WITH MD., FEDERAL AND STATE COURT DECISIONS AND WITH WEIGHT OF AUTHORITY AND DEPRIVED PLAINTIFFS OF CONSTITUTIONAL RIGHTS.

C.C.A. held that Md. Ct.'s rulings respecting changes made by 32 reorganization was correct under Md. law, under NCR's charter and under corporation laws of Md. It also ruled that the secretary of NCR in reporting to Md. Tax Commissioner that the Articles of Reduction of its capital stock, amendment authorizing issuance of 200,000 C shares, having same rights as A shares and right to exchange same for B shares, both acknowledged by defendant, Allyn, and sworn to and filed by defendant Kuhns, Dec. 20, 32 (ex. 4, 5, apx. 334, 344) and the amendment authorizing issuance of 238,000 A as so-called split-up stock to be issued to A holders in lieu of their accumulated and future preferred dividends, acknowledged by Allyn, and sworn to by Kuhns, Dec. 23 and filed with Tax Commissioner Dec. 27, 32, and stock issuance statement acknowledged by Allyn and sworn to by Kuhns Dec. 23, 32 and filed with Commissioner Dec. 28, 32 (ex. 7, 8, apx. 348–355) inc) falsely swearing that these documents had been authorized, in accordance with notice to stockholders, by 2/3rds of each class of A and B, when the changes had only been authorized by 2/3rds of the outstanding shares included as a single class, was unfortunate, immaterial error, and that the statement as to the reduction of the capital stock had no bearing upon the actual value of its share or the corporate assets.

The decision of both courts conflicts with *Chesapeake Corp.* v. *Tri-Continental Co.,* Derns, C. J., C.C. 2, Balti-

more, Common Pleas, Aug. 2, 37, where court held that the changes in the terms of cumulative preferred 5½ stock depriving them of accumulations and other rights were repugnant to rights secured by Md. law, contract and under Art. 23, s. 28, which has application here.

Coleman, J. stated in 27 F.S. @ 645 that Md. courts have never decided or considered this question-overlooking above case and that it has never been decided by federal courts, although it had been considered in N.Y., N.J. and Del. favorably to dissenting holders. He erroneously held that Md. statutes were broader than those in these states and are therefore not controlling, citing cases. Clearly C.C.A. and Md. courts' decision conflicts with *Keller* v. *Wilson*, 180 A. 584, affirmed, 190 A. 115; *Bank* v. *Veigh*, 61 Va. 457; *Breslav* v. *N.Y.Q. Co.*, 249 A.D. (N.Y.) 181; *Whicker* v. *Del. Corp.* 15 Pac. (2) 160; *Miller* v. *State*, 15 Wall. 478, 486, 493; *Yoakum* v. *Biltmore Co.* 34 F (2) 533; *Londsale Co.* v. *International Co.* 101 N.J. Eq. 554; *Dow* v. *North*, 67 N.H. (1) 17, 18; Opinion of Justices, 66 N.H. 629, 633; *Dartmouth College* case, *Ashton* v. *Burbank*, Fed. cases #582; *Davis* v. *Louisville Co.* 142 A. 564 (Del); *Coombs* v. *Goetz*, 285 U.S. 434; *Locker* v. *Maynard*, 179 U.S. 46. *Greer Co.* v. *Booth, supra.*

Lower courts erred in holding that federal courts have never decided this question. Yoakum case squarely decides it. He erroneously states Md. statute, takes case out of conflicting decisions. It does not. Md. laws, Art. 23, s. 23 and Art. 7 of NCR's charter do not authorize these violent changes of A holders' rights, a fortiori, in favor of B holders who manipulated the transaction and failed to disclose their interest and committed other wrongs which they concealed. They had no such depredating purpose and cannot be construed in any event to take vested, contractual, statutory and constitutional rights from them, a fortiori in their own favor. Charter of NCR (apx. 313) states

rights of A holders and rights to make changes. (Arts. 6, 7.) It does not authorize changes in the "terms" of any issued and outstanding shares, nor does it authorize any stripping or conversion of rights of A holders, a fortiori to give value to valueless B. That could no more be done under the charter than A could by their votes (and they held more than 2/3rds) take away rights of B to control NCR with all its benefits. Each article must be construed like any other contract, as part of an entirety, in its relation to whole.

Art. 7, nor s. 23 cannot be interpreted to authorize the issuance of the 238,000 A shares in lieu of accumulated and future dividends, payable in cash, nor authorize creation of C shares to be exchanged for B shares and grafted on to rights of A holders, compelling A, who contributed all NCR's capital to share dividends which were guaranteed to them with B holders giving them 1/8th of earnings. Cases are numberless to the effect that state powers reserved to change, alter or amend corporation's charter can not take away from stockholders vested property rights. It may as well be asserted that B holders could, without A's consent, take private property whenever they chose to do so.

Art. 6 of charter provided that A shall be entitled, in preference to B, to dividends at $3, payable quarterly; that whether earned, not earned or declared, they shall be cumulative and when not paid or declared, the deficiency shall be paid before dividends are paid to B; that subject to this preference, non-cumulative dividends of $3, when declared, shall be paid to B before any dividends are paid on A stock, in addition to A cumulative preferential dividends; that A and B, as if holders of one class, shall share additional dividends.

Undoubtedly, as a matter of right and contractually, cumulative dividends gave the A vested, constitutional

rights which B nor any one else could deprive them of. Art. 7 was necessarily subject to and not in derogation of Art. 6.

The same situation arose in cases cited, especially the Keller and Yoakum cases, both of which have been cited with approval and the Keller case has been reaffirmed.

Art. 7 must be construed as intending to benefit NCR, not as changing inter sesse rights of shareholders. NCR could issue additional A shares for consideration or for exchange of shares of another class which took none of their rights and did not change any of the "terms" of their contract as provided in Art. 23, s. 28. If the "terms" were changed as they were here, then s. 28 required the consent of all shareholders, a fortiori where cumulative dividends accrued. S. 28 permitted charter provisions which could make change of terms by 2/3rd vote of each class of stock. There was no such provisions here. Therefore, unanimous consent was necessary to affect the change in the terms of A shares or to illegally increase the number of A shares. It is needless to discuss whether 2/3rds of A could vote to waive accrued dividends. Cases hold this could not be done. Yoakum, Keller and Chesapeake cases so hold. Certainly it could not be done by vote or action of those who secretly and in violation of their fiduciary duties profited thereby. It is of no consequence whether B gave up rights or not. Their shares were valueless, their control would have been lost but for their manipulations, their lucrative positions were menaced, and their liability for wrongs committed was threatened. To hold, as the lower courts did, that they surrendered anything of value, in view of their depredations (apx. 55) is to claim that they were saints, instead of depredating trustees.

6. CCA'S DECISION THAT DEEDS' OPTION WAS PROPER CONFLICTED WITH MD. DECISION, DECISIONS CITED BY IT, WITH WEIGHT OF AUTHORITY AND WITH AUTHORITY AND WITH DECISIONS OF THIS COURT.

In support of its conclusion, C.C.A. relies on *Wight* v. *Heublein,* 238 F. 321 (CCA 4). Md. Ct. cited *Rogers* v. *Hill,* 289 U.S. 582, *Kopler* v. *Warner Co.* 19 F.S. 173; *Matthews* v. *Headley, supra; Seitz* v. *Union Co.* 152 Minn. 533; *Ransome Co.* v. *Moody* 282 F. 29; *Presidio Co.* v. *Overton* 261 F. 933; *Francis* v. *Brigham Co.* 108 Md. 233. None of them support conclusions of either court. The facts in them are radically different from those facts here. Rather than supporting their conclusions they are opposed to them. In the *Wight* case, there was a decree for plaintiff shareholders, not for the defendant officers. Notwithstanding that earnings were very high for a long period, for 3 yrs. earnings were low and no dividends were paid. Salaries were $15,000, $7500, and $4200, which were substantially reduced. Both courts held that salaries were excessive, disproportionate to services rendered, and unjust to minority. The court relied on 3 Clark & Marshall Corps. 2062 and *Wickersham* v. *Crittenden,* 93 Cal. 17, which held that directors could not vote *excessive* compensation to themselves or others and that equity will enjoin such acts or compel accountings. The latter case held that since directors were fiduciaries, entrusted with the management, that by their acceptance of office they precluded themselves from doing any acts or engaging in any transaction in which their private interests conflicted with their duties to stockholders and from using their power or corporate property for their advantage. This case is in direct conflict. In *Sietz* case, salaries and bonus received were small and were based on earnings, after making provision for invested capital. Officers gave their entire time to the business, paid dividends as high as 16%

and put by substantial surpluses. In *Kopler* case, suit had previously been brought in other courts to recover excessive salaries and stock issued, which had been settled, defendants returning substantial consideration to their corporation. Other stockholders sued to establish liability against them for same wrongs. The court held that stockholders were bound by the settlement. In the *Headley* case, corporation sued, not minority shareholders. The court did not hold there, that salaries paid to defendant management were not excessive or recoverable. It held that corporation, managed by persons who had acquired their stock from defendants, could not recover. It held also that minority stockholders might recover, proportionate to their stock holdings, the excesses paid defendants. In the *Ransome* case, corporation sued to set aside an employment contract. Defendants counter-claimed for breach. P. 34, Hough, J., held in effect that the suit was not brought by minority shareholders but was brought by corporation, that minority holders were not estopped from suing, as they did not consent to the arrangement, that the corporation, more particularly since majority stockholders which controlled it and made contract, is estopped. It strongly indicated that if minority sued they could recover. The *Presidio* case is very long. The salaries were meagre, about $200 to $400 per month and earnings were substantial. Not one of the cases is even remotely pertinent here.

Conclusions of lower courts conflict with *National Co.* v. *Hogland,* 101 F. (2) 576; *Dupont* v. *Dupont,* 242 F. 98; 256 F. 129; *Loft* v. *Guth,* 5 A (2) 503, 10, 11, 14, 15; *Wooton* v. *Ownbay,* 265 F. 91, 99; *Amer. Works* v. *Powell,* 298 F. 417, 422, 423; *Godley* v. *Crandall* 212 N.Y. 129; Perry on Trusts (ed. 7, vol. 1) par. 427, p. 710; par. 429, p. 714; par. 430, p. 717; par. 431, p. 717; par. 432, p. 719; par. 433, p. 721; *Pollitz* v. *Wabash* 207 N.Y. 113, 124; *Chamberlain* v. *Chamberlain,* 209 F (2) 357; *Irving Co.* v. *Deutsch* 73 F (2) 121,

3, 4; *Beatty* v. *Guggenheim* 225 N.Y. 380; *Brounschwig* v. *Carthage Co.* 334 Mo. 319.

It conflicts with Md. cases. *Peninsular Co.* v. *Johnson,* 128 Md. 535; *Fisher* v. *Barr* 92 Md. 245; *Md. Ct.* v. *Mechanics Bank* 102 Md. 617; *Burke* v. *Smith* 11 Md. 616; Brune Md. Corp. Law, p. 74, s. 61.

It conflicts with cases in other states. *Provident Co.* v. *Geyer,* 248 Pa. 423, 430; *Glenn* v. *Kittanning* 103 A. 340; *Little* v. *Phillips* 208 Mass. 331; *Stratus* v. *Anderson* 254 Mass. 536; *Sagalyn* v. *Meekins,* 290 Mass. 434. It conflicts with decisions of this court, *Rogers* v. *Hill,* 289 U.S. 582; *Rogers* v. *Guaranty Co.* (Dis. Op.) 288 U.S. 123, 133. See *Bogardus* v. *Commissioner,* decided by this court Nov. 8, 37; *Northern Co.* v. *Southern Co.* 73 F (2) 333, 335.

The lower court failed to consider NCR's earnings and A dividend requirements. Between 26 and 29 inc. annual earnings ran between $6,786,000 and $8,339,000. In 30 earnings were $3,544,000; 31, a deficit of $1,179,000; 32, the loss was $4,499,000, wiping out surplus of 31 of $1,022,000, impairing capital $3,472,910; 33 loss was $1,131,396, increasing impairment to $4,604,806. Unpaid dividends for 31 and 32 were $6,693,732, and for 33 increased to $11,298,038. In 34 about $14,868,000. The profits between 34 and 38 were $739,371; $1,020,409; $1,959,000; $1,211,507 deducting undistributed foreign profits unavailable for dividends.

It is too obvious to require discussion that if the option was a bonus from which Deeds obtained a profit of $30 per share on the 60,000 shares he acquired, in addition to $100,000 annual salary that he was not only being excessively paid but he also was eating into the corporate capital in chunks. If there were any earnings they were available first to A shareholders. NCR, not Deeds, was entitled to profits on investments made by it. Dividends and earnings were so meagre compared to his salary and bonus as to give no warrant whatsoever for any such compensation. If, on the

other hand, there was no relation whatsoever between the option and the services which he rendered, then clearly, under *Rogers* v. *Hill* and the authorities above cited, what he received was a gratuity, the use of NCR's funds in speculative enterprise, wholly and unwarrantably for his benefit, which did not enrich it, and while he was a fiduciary. He was forbidden by Md. law, s. 87, *Hagerstown Co.* v. *Baker*, 155 Md. 549, *Natl. Co.* v. *Hogland* 101 F (2) 576, to borrow or use its funds or to make use of its assets and structure in his own interest. The option contract of Sept. 16, 32 (apx. 307) made 1½ years after he became chairman and a director, within a few days of the consummation of the 32 reorganization, consideration of which began in 31 after he was elected, does not recite the salary he received. It recited that he be given right to *purchase* A shares in amounts and on terms to be agreed upon between him and the corporation. The option was not a purchase agreement. It his no relation whatsoever to the value of his services (*Rogers* v. *Hill*), and is unconnected with any services which he has rendered or is to render. It is clearly a void contract never at any time known to or ratified by stockholders. It is unnecessary to discuss here the wrongful acts in which he was the chief participant as chairman of the corporation which would deprive him of any salary or option. During his incumbency, in 36, the liabilities increased from $3,650,270 to $7,286,992, by the borrowing of $3,250,000. Earnings per share during his incumbency were nothing in 31, deficit of $2.09 in 32, deficit of $.36 in 33, $.89 in 34, $.93 in 35, $1.76 in 36, $2.41 in 37, $1.30 in 38. No dividends were paid in 31, 32 and 33. $.37½ was paid in 34, $.50 in 35, $1.00 in 36 and $1.25 in 37. In 8 years A holders received $.12½ dividends. By the capital reduction scheme they received over this period $4,562,361 under the guise of dividends when it was in fact their own capital. Part of this capital was paid in dividends to B. During first 5 years of NCR's opera-

tions when Deeds was not connected with NCR its profits were $34,000,000, annual average of $5,666,000. 31 to 33, loss was $6,990,992. Profit 34 to 35 was $1,959,780. Profits unavailable for dividends 34 to 38, incl., were $6,803,953, less than 2 years A requirements—less by nearly $4,000,000 5 years A requirements and with foreign undistributed profits added, it was $11,137,000, less by $6,000,000, 4 years A requirements. Deducting loss 31 to 33, incl., $6,990,992 from profits 34 to 38, incl., without undistributed foreign profits, NCR between 31 and 38 showed loss of $106,039; including undistributed profits, profits 31 to 38, incl., were $4,228,135 total, only $700,000 more than one year's A requirements. (Ann. rep. 30 to 38 Apx.)

The conclusions reached by lower court were based upon facts and circumstances which were not only erroneous but in conflict with all authorities.

Use by deeds with consent of other directors for NCR's funds to make profit for themselves violated their fiduciary duties. *Greer Co.* v. *Booth, Peterson* v. *Hopson, supra.*

7. THERE IS NO DECISION BY THIS COURT WHICH SETTLES OR DETERMINES THE LAW ON THE VITAL AND IMPORTANT ISSUES HERE, MORE ESPECIALLY AS TO POINTS 1, 2, 3, 5.

Wherefore, applicants pray that their petition shall be granted.

Respectfully submitted,

ISRAEL GOROVITZ,
Counsel for Applicants.

ARTHUR BERENSON,
BERNARD BERENSON,
of Mass. Bar.

LAWRENCE BERENSON,
of N. Y. Bar,
of Counsel for Applicants.

No 476

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

BRYANT McQUILLEN ET AL, PETITIONERS,

-AGAINST-

THE NATIONAL CASH REGISTER CO., ET ALS,
RESPONDENTS.

MOTION THAT RECORD FILED HEREIN BE DEEMED SUFFICIENT FOR APPLICATION FOR WRIT OF CERTIORARI TO THE C. C. A. (4).

Application for a writ of certiorari to the C.C.A. (4) having been filed in this court, Sept. 30, 1940, applicants move that certified record on appeal from the D.C. of M.D., record of proceedings in the C.C.A. (4), applicants' and respondents' printed appendices filed in the C.C.A. (4), copies of NCR's annual reports for 30–37 inc., and such other records, papers and proceedings as were sent here by the C.C.A. (4) shall be considered as the record for the determination by this court of their application. In support hereof, applicants state:

Pursuant to C.C.A. (4) R. 10, applicants filed in C.C.A. a complete record on appeal from the interlocutory and final decrees of the Md. court. They attached to their brief a printed appendix of such parts of the appeal as they deemed necessary for the C.C.A. (4) to read and consider omitting NCR's annual reports for 30–37 inc. Copies of such parts of latter, agreeable to respondents, are filed here. Respondents also filed printed copies of such parts of appeal record as they deemed necessary for C.C.A. to consider.

It thereafter rendered its opinion affirming lower courts' judgment.

Pursuant to C.C.A. rule and rule of this court, C.C.A. (4) filed here a certified appeal record, record of proceedings in its court, all proceedings, evidence and exhibits introduced below, and 12 copies of said printed appendices, which constitutes everything essential and necessary for the consideration of their application here.

Applicants requested respondents to stipulate that such record be deemed sufficient for the purpose of this application. Respondents declined to stipulate, insisting that their appendix be re-printed and inserted in applicants' appendix, more especially because there was omitted (inadvertently) from Md. Ct.'s final opinion (aplts.' apx. pp. 98–129) 2 paragraphs, printed in respondents' appendix and in 27 F.S. 639, 645, par. 1, 646, through par. 1. Such omission occurred because the opinion was copied from the Daily Record of Baltimore, May 9, 39, which omitted these 2 paragraphs.

There is now before this court all matters necessary to enable it to fully determine this application. Re-printing the whole or parts of respondents' appendix, omissions or other parts of record, is unnecessary and wasteful. Applicants aver that respondents' refusal to stipulate, is arbitrary, putting them to unnecessary expense and hardships and unduly hindering them. Applicants offer to print, reprint or revise such parts as this court shall order.

Wherefore, applicants pray that their motion be allowed, that records and papers filed here as aforesaid be deemed sufficient for the purposes hereof and for further relief as shall be just.

ISRAEL GOROVITZ,
Counsel for Applicants.

ARTHUR BERENSON,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 476.

BRYANT McQUILLEN, ET AL.,
Petitioners,

v.

THE NATIONAL CASH REGISTER COMPANY, ET AL.,
Respondents.

BRIEF ON BEHALF OF THE NATIONAL CASH REGISTER COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

JAMES PIPER,
Counsel for Respondent,
The National Cash Register Company.

R. DORSEY WATKINS,
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CHAUNCEY B. GARVER,
of the New York Bar,
Of Counsel.

The Daily Record Co. Print, Baltimore.

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BRIEF ON BEHALF OF THE NATIONAL CASH REGISTER COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

Scope of Brief.

This case was begun in the District Court of the United States for the District of Maryland as a minority stockholders' suit. From the beginning the corporate defendant on whose behalf relief was allegedly sought, but whose entire corporate structure would have been disrupted if the plaintiffs had succeeded, has been represented by one set of counsel, Lee Warren James, one of the individual defendants, by other counsel, and the

remaining individual defendants by a third. In the Circuit Court of Appeals separate briefs were filed and separate arguments made by these respective counsel. This Brief will deal with points 2, 3, 4 and 5 of the Petition, which question the decision of the Circuit Court of Appeals on points briefed by counsel for the Company below. To permit a direct comparison with the Petition and Brief of Applicants, the same numbering will be used herein.

In their Statement of Proceedings in the Circuit Court of Appeals (Applicants' Brief, p. 11) no mention is made by Applicants of their petition for extension of time to file a petition for rehearing. Extensions were granted, but as there is no record of any petition having been filed within the extended time (III-15)*, they properly treat the judgment of the Circuit Court of Appeals, entered June 11, 1940, as final.

Position of this Respondent.

It is the position of this Respondent that no case has been presented requiring or justifying the exercise by

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* This Respondent was served with "Volume III" of the transcript of record, consisting only of the proceedings in the Circuit Court of Appeals and the extensions of time granted by this Court. Counsel for the individual defendants other than James was served with two other volumes, not entitled in this Court, and not numbered as volumes of the transcript. One of these consisted of the *brief and* appendix of appellants in the Circuit Court of Appeals (Applicants here) and the other of the appendix on behalf of all appellees in the Circuit Court of Appeals. It is assumed that appellants' appendix below is intended to be Volume I of the transcript and the appendix of appellees to be Volume II, and references are accordingly made.

this Court of its discretion to grant a writ of certiorari. The reckless charges of wrongdoing were completely disposed of by the findings of fact; and the questions of law were neither novel nor of general importance and were correctly decided in accordance with the applicable decisions and statutes.

The statement of points in the Petition and Brief of Applicants consists substantially of a mere paraphrase of Supreme Court Rule 38 (5). The "Statement" in the Petition is simply a summary of the original and amended bills of complaint, the allegations of which, insofar as they were in issue, were not sustained by any evidence and were squarely in conflict with the facts as found by the District Court, and concurred in by the Circuit Court of Appeals. The argument is a didactic statement that the decisions below were in conflict with numerous decisions of state courts, this Court and other Federal Courts. In no instance, however, is any attempt made by the Applicants to analyze the cases cited or to show by quotation or page reference that a conflict exists. No quotation from the Maryland statutes is made. Applicants seem again content to follow their previous practice of substituting "abuse for reasoning, and adjectives for record references." *McQuillen v. The National Cash Register Company,* 27 F. Supp. 639, 650.

It is the purpose of this Brief to demonstrate that there is no merit in points 2, 3, 4, 5 and 7; that the decisions of the trial Court and of the Circuit Court of Appeals are not in conflict with, but follow and apply, well established and controlling principles of law, and that no question calling for a review by certiorari is presented.

The number of citations appearing in Applicants' Brief* would lead to an unduly protracted brief if a detailed reply were to be made which took up the alleged authorities seriatim. This Brief will accordingly deal with the points in general terms. A further analysis of the citations is attached as part of the Appendix.

Summary of Points.

The argument on behalf of this Respondent will be developed under the following points:

2. *The application of Equity Rule 27 (Federal Rules of Civil Procedure 23(b)) was in harmony with the decisions of this Court and of the Maryland Court of Appeals.*

3. *The decision requiring representation of holders whose shares are sought to be cancelled correctly applied well-established principles of law.*

4. *The Courts correctly limited the scope of depositions under Rule of Civil Procedure 30(b).*

5. *The decision upholding the 1932 recapitalization properly applied the applicable Maryland law.*

7. *The decisions of the lower Courts correctly followed the decisions of this Court on Points 2 and 3; Point 5 is a matter of Maryland law only.*

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* In point 2 there are 36 citations; in point 3 there are 31; in point 4 there are 17, and in point 5 there are 16.

ARGUMENT.

2.

THE APPLICATION OF EQUITY RULE 27 (FEDERAL RULES OF CIVIL PROCEDURE 23(b)) WAS IN HARMONY WITH THE DECISIONS OF THIS COURT AND OF THE MARYLAND COURT OF APPEALS.

The complaint as originally filed (Record before the Circuit Court of Appeals, p. 1) and amended complaint (Record I, pp. 1, 57) affirmatively alleged that the plaintiffs "first acquired [stock of the Company] on or about June 20, 1928." Additional stock was purchased by plaintiffs on or about January 10, 1929 (I, 1). The Circuit Court of Appeals accordingly affirmed the order of the District Court striking from the complaint all allegations and prayers for relief with respect to transactions prior to June 20, 1928. In so doing both Courts merely applied the unequivocal provisions of Equity Rule 27 (now F. R. C. P. 23(b)) that:

> "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation * * * must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains * * *."

The decisions of this Court, of the Circuit Courts of Appeals and of the District Courts have uniformly *and without exception* applied this rule without qualifications in cases such as this. None of the Federal decisions cited by the Applicants is to the contrary, and counsel for this Respondent know of none. The Federal decisions cited by the Applicants fall into the following general classes:

1. Those which directly recognize and apply the rule as written, e. g.

Venner v. Great Northern R. Co., 209 U. S. 24, 33-34,
Dimpfel v. Ohio, etc., R. Co., 110 U. S. 209, 210,
Quincy v. Steel, 120 U. S. 241, 246.

2. Those which deal with another portion of the rule, requiring an effort to be made to secure action from the directors or stockholders, or an explanation for the failure to make such effort; e. g.

Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 445,
American Creosote Works v. Powell, 298 F. 417, 420 (C. C. A. 5, La. 1924).

3. Those holding that in cases *removed* to the Federal courts solely on the ground that a Federal question is involved, or begun in the Federal courts because of such question, the requirement of ownership at the time of the transaction attacked will not be applied; e. g.

Hand v. Kansas City, Southern Ry. Co., 55 F. 2d 712, 714 (D. C. N. Y., 1931).
Ball v. Rutland R. Co., 93 F. 513, 515 (C. C. Vt., 1899).
Lindsley v. Natural Carbonic Gas Co., 162 F. 954, 957 (C. C. N. Y., 1908).
Jablow v. Agnew, 30 F. Supp. 718, 719 (D. C. N. Y., 1940).

Whether or not the cases in this last group are correctly decided is an interesting question but one not in any way involved in this case. Even the New York district courts recognize that in a case removed on the

grounds of diversity of citizenship, the provisions of Equity Rule 27, F. R. C. P. 23(b) apply.

Venner v. Great Northern Ry. Co., 153 F. 408, 418.
Jacobson v. General Motors Corporation, 22 F. Supp. 255, 257, 258 (D. C. N. Y., 1938).*
Hitchings v. Cobalt Central Mines Co., 189 F. 241, 243 (C. C. N. Y., 1910).

The above cases and all the authorities cited by the Applicants under this point are analyzed (Appendix, pp. 28-32).

There is accordingly no conflict but a complete harmony with the decisions of this Court and the rules promulgated by it; i. e., the Equity Rules and the Rules of Civil Procedure.

The Circuit Court of Appeals found it unnecessary to determine whether or not since *Erie Railroad Co. v. Tompkins*, 304 U. S. 69, and *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, it would be necessary to follow the applicable State rule, as it found that "the Maryland doctrine is in line with the rule" uniformly followed by the Federal courts before those decisions (III, 9). Applicants apparently concede that Equity Rule 27 and its counterpart, F. R. C. P. 23(b) are procedural and not substantive (Applicants' Brief, p. 21). The promulgation of the new rules after the *Erie* and *Ruhlin* decisions would certainly indicate that they are procedural. The Federal decisions since the *Erie* and

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* Messrs. Arthur Berenson and Bernard Berenson who appear as of counsel on this Application were also of counsel in the *Jacobson* case.

Ruhlin cases have treated the rules as unaffected by those decisions,

> Wales v. Jacobs, 104 F. 2d 264, 267 (C. C. A. 6, decided June 6, 1939),
> Rinn v. Asbestos Mfg. Co., 101 F. 2d 344, 345 (C. C. A. 7, decided November 22, 1938, rehearing denied February 16, 1939),

even in New York where the state law is to the contrary.

> Summers v. Hearst, et al., 23 F. Supp. 986, 992 (D. C. N. Y., 1938),
> Bachrach v. General Investment Corporation, 29 F. Supp. 966, 967 (D. C. N. Y., 1939).

If, however, the question is one of substantive law, the Circuit Court of Appeals was clearly right in holding that the Maryland doctrine is in line with the Federal rule.

In *Matthews v. Headley Chocolate Co.*, 130 Md. 523, this question was presented to the Court in a manner requiring a direct decision. Demurrers had been sustained to a bill below in the name of the corporation to recover for allegedly excessive salaries paid the former officers, prior to the acquisition of stock by the real plaintiffs. The decision turned primarily upon the proposition that transferees from alleged wrongdoers could not themselves complain of or recover for such wrongs, but the Court entered into a lengthy discussion (pp. 531-534) "as to whether a shareholder who becomes such after the acts complained of were committed can sue * * *", holding that he could not; that a suit in the name of the corporation could be brought, but for the benefit only of minority stockholders not transferees (p. 535) and "not

barred by laches, limitations, acquiescence or other way sufficient to bar them in equity" * * * (p. 537).

The Court quoted with approval from *Home Fire Insurance Co. v. Barber,* 67 Neb. 657, 93 N. W. 1024, that "Sound reason and good authority sustain the rule that a purchaser of stock can not complain of the prior acts and management of the corporation" (p. 531), and that the rule was not "based on jurisdictional considerations peculiar to the Federal courts and on obsolete common law doctrines" (p. 532). It considered but rejected the reasoning of the leading case to the contrary, *Pollitz v. Gould,* 202 N. Y. 11, 94 N. E. 1088, and in summary said (p. 534):

> "If this was a suit by stockholders, it would seem to us to be clear that holders of the stock who become such after the transactions complained of took place, should not be permitted to recover against the directors.* * *"

The same conclusion served as an alternative ground for the earlier decision in *Tompkins v. Sperry, Jones & Co.,* 96 Md. 560, 583-584.

The *Matthews* case also recognized and applied the general rule that transferees from an alleged wrongdoer cannot themselves complain of the alleged wrong. 130 Md. 523, 532-533, 535. In the case at bar, the complaint alleged that all the authorized A shares were originally issued to or immediately acquired by some of the individual defendants (I, 14, 17). The Petitioners therefore are transferees of the very persons of whose alleged wrongs they complain. This of itself constitutes a sufficient non-controversial ground for the decision of the Circuit Court of Appeals.

It is accordingly submitted that the Circuit Court of Appeals applied Equity Rule 27, F. R. C. P. 23(b) correctly, in harmony with the decisions of this Court, all other Federal decisions and those of the Maryland Court of Appeals, and that no basis has been presented requiring a review of this decision.

3.

THE DECISION REQUIRING REPRESENTATION OF HOLDERS WHOSE SHARES ARE SOUGHT TO BE CANCELLED CORRECTLY APPLIED WELL-ESTABLISHED PRINCIPLES OF LAW.

In the case at bar the plaintiffs sought the cancellation of 238,000 shares of Common A stock authorized in December, 1932, to be issued to the holders of Common A stock "pro rata, not as a stock dividend but as a split-up of stock" (I, 171, 331, 345; II, 72). On or about December 30, 1932, these shares were distributed to all A shareholders, including the plaintiffs. The certificates for shares distributed to the plaintiffs were still, at the trial in January, 1939, held by them (II, 40) and there is no evidence that any other shareholder refused to accept, or returned, his certificates. Furthermore, all shareholders other than the Applicants have accepted dividends on the new Common stock which since April, 1934, has represented these shares. (II, 88; Finding of Fact 17.) Accordingly when the plaintiffs filed their bill in July, 1934, it was to attack a consummated transaction in which everyone except perhaps the plaintiffs had acquiesced.

The plaintiffs sought the cancellation of shares of A stock held by other holders who apparently wished to retain them, as they have not intervened, but have retained the certificates, and dividends. It would seem

elementary that under such conditions, the position of the plaintiffs was adverse to the other holders of A shares and that the certificates of these holders could not be cancelled unless such holders were joined or adequately represented.

Since July, 1934, the plaintiffs have been on notice that it was the contention of the Company that the holders of the A shares, or proper representatives thereof, were indispensable parties (Record before the Circuit Court of Appeals, pp. 48-54, 104-108). Neither the original bill nor the amended bill filed more than six months after such notice, alleged the ownership of any of these 238,000 A shares *at any time by any of the defendants.*

This suit was, as to this portion of the complaint, not a representative one, since the plaintiffs alone represented and constituted the only group seeking, or that has sought, cancellation of these shares. Applicants do not now claim that the suit was a representative one under Equity Rule 38. This contention was so conclusively answered by the trial Court (I, 89-90) that it appears to have been abandoned. Nor was the Corporation a representative of shareholders (whether upholding or attacking the issuance of such shares) for this was clearly a controversy between members of a class. The action for the cancellation of the 238,000 A shares was not a derivative suit—one in which a corporation has a right which it refuses to enforce, therefore plaintiffs may proceed in its name. A derivative suit necessarily involves a right of action by the corporation against some one; an adverse claim. The cases are clear that when the gravamen of the complaint consists of a vital conflict between different classes of stockholders,

or a conflict among stockholders of the same class, the corporation is not a proper "representative."

Baltimore, C. & A. Ry. Co. v. Godeffroy, 182 F. 525, 534 (C. C. A. 4, 1910).
Weidenfeld v. N. Pac. Ry. Co., 129 F. 305, 311-312 (C. C. A. 8, 1904).
Taylor v. Southern Pac. Co., 122 F. 147, 153-154 (C. C. Ky., 1903).
Hoole v. Great Western Railway Co., L. R. 3 Ch. App. 262 (1867).

The citations by Applicants do not support the claim that the result reached by the Circuit Court of Appeals, the cases relied upon by it, or the other cases cited, show a conflict with decisions of this Court, of the Circuit Court of Appeals, or with the weight of authority. The cases relied upon by the Circuit Court of Appeals do support the proposition that the rights of owners of, or claimants to an interest in, property cannot be destroyed without the joinder of such party and an opportunity to appear and defend. A stockholder is a necessary party to a suit to declare his stock void, or to affect his rights in or under such stock.

Of the cases relied upon by the Courts below, (I, 90-91, III, 9-10), the case of *Weidenfeld v. N. Pac. Ry. Co.*, 129 F. 305 (C. C. A. 8, 1904) contains perhaps the clearest statement to this effect. In that case the plaintiff, a minority stockholder, filed his bill seeking to have the Court declare void the formation of Northern Securities Company and the transfer of stock of the defendant company to it. The Securities Company was not made a party. In dismissing the bill for failure to join and serve this indispensable party, the Court said (pp. 310-311):

"The remaining contention of appellant, necessary to be considered, is that the Circuit Court erred in

holding that the securities company was an indispensable party to the suit, and that in its absence the intervening petition could not be maintained. The theory of the appellant is that, as an individual stockholder, he can maintain a suit against his corporation as sole defendant to prevent it from commencing or continuing the doing of those things which are beyond its corporate powers, are in violation of law, and which may lead to a forfeiture of its corporate franchises; that, in respect of the charges made in his intervening petition and the relief sought thereby, the defendant company may stand as the sole representative in the suit of all of the stockholders, including the securities company, and that, therefore, the presence of the latter may be dispensed with. But appellant ignores the force of the pressing and insistent fact that the very thing of which he complains is primarily the ownership by the securities company of a majority of the stock of the defendant, and the end which he is seeking is the destruction of its title and its status as a stockholder. It is of the foundation of our jurisprudence that the rights of a person shall not be directly affected by a judicial proceeding to which he is not a party, and in which he cannot be heard for their defense and protection. Out of this principle has grown the rule, always recognized and enforced, that a suit will not be entertained in the absence of a person who has an interest in the controversy of such a nature that a final decree cannot be rendered without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Minnesota v. Northern Securities Company, 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499; New Orleans Waterworks v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; California v. Southern Pacific Company, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683; Christian v. Railroad, 133 U. S. 233, 10

> Sup. Ct. 260, 33 L. Ed. 589; Ribon v. Railroad Companies, 16 Wall. 446, 21 L. Ed. 367; Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; Taylor v. Southern Pacific Company (C. C.) 122 Fed. 147; Hollifield v. Railroad Company, 99 Ga. 365, 27 S. E. 715; Joslyn v. St. Paul Distilling Company, 44 Minn. 184, 46 N. W. 337. Taylor v. Southern Pacific Company, Hollifield v. Railroad Company, supra, and the case at bar, are identical in important and controlling features. In each case the complainant was a minority stockholder of the defendant corporation, and in each case the complainant undertook to lay the ax at the root of the title of an absent stockholder. In the two cases cited it was held that the presence of a stockholder whose rights were attacked was indispensable to the accomplishment of the complainant's purpose."

At least ten of the cases cited by Applicants have no apparent bearing whatever upon the question of joinder of parties defendant. Others directly support the position of the trial Court and the Circuit Court of Appeals. In still others, the plaintiff was acting only on his own behalf.

Other citations indicate a complete lack of appreciation of the fundamental difference between the instant case and cases in which an injunction is sought to prevent a *proposed* change in corporate structure alleged to be fraudulent, *ultra vires* or illegal. In such cases the personal interest of any stockholder seeking to prevent such unauthorized action is sufficient. Such a case was the *nisi prius* decision in *Tri-Continental Corporation, et als. v. The Chesapeake Corporation, et al.*, in the Circuit Court No. 2 of Baltimore City (The Daily Record, Baltimore, August 17, 1937). There, stockholders in their

own right sought to enjoin the two defendant corporations from taking action to consolidate on terms alleged to be both unfair and illegal. Both parties to the proposed consolidation were joined as defendants.

Applicants also cite a number of cases holding that the situs of stock at the domicile of the corporation constitutes a *res* permitting substituted service under 28 USC, §118 (Judicial Code, sec. 57). But that is exactly what the trial Court decided in this case, on a motion for such service (13 F. Supp. 53). These cases further recognize that while the presence of the *res* permits the use of substituted service, the persons interested in the *res* must be made parties defendant, and must be served in the manner provided in §118. The plaintiffs, however, made no effort to comply with this section as to any person claiming to be a holder of A stock.

The cases cited by Applicants are further analyzed and classified in the Appendix hereto (pp. 33-36).

If the Applicants had made an honest effort to name as defendants a group fairly representative of the holders of A shares (*American Steel & Wire Co. v. Wire Drawers', etc., Unions*, 90 F. 598, 607) and had served them as required by 28 USC, §118, a different question of representation might fairly have been raised. It is submitted, however, that in a contest between the plaintiffs on one side and all other holders of A shares on the other, the Courts below correctly dismissed this portion of the complaint for failure to join indispensable parties. These decisions were in entire harmony with elementary principles of law as to which there is no conflict, and no occasion for review is presented.

4.

THE COURTS CORRECTLY LIMITED THE SCOPE OF DEPOSITIONS UNDER RULE OF CIVIL PROCEDURE 30(b).

The trial Court by its orders previously mentioned had properly limited the scope of the complaint to two issues—the 1932 recapitalization and the Deeds option. Shortly before the time set for trial, plaintiffs served notice of intention to take depositions, and a notice to produce. This Respondent was included among those to be examined. From the Schedule attached to the subpoena duces tecum (Record before Circuit Court of Appeals, pp. 402-417), it was clearly apparent that the plaintiffs intended to examine by deposition in the same manner as if the entire complaint were before the Court for hearing on the merits. Applicants admitted in their Brief before the Circuit Court of Appeals (p. 14) that the notice to produce covered "all transactions including those stricken."

Under the Federal Rules of Civil Procedure pursuant to which notice of the depositions was given, the Court had full authority to pass an order limiting the scope of the depositions. The relevant portions of Rule 30(b) read as follows:

> "(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order * * * that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters * * *; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression."

The Court in limiting the depositions properly confined the inquiry to those matters which were "relevant to the subject matter in the pending action" (Rule 26(b) F. R. C. P.). The order was properly within the sound discretion of the Court (III, 10).

See Rose Silk Mills, Inc. v. Insurance Company of North America, 29 F. Supp. 504, 505-506 (D. C. N. Y., 1939).

Union Central Life Insurance Company v. Berger, 27 F. Supp. 556, 557 (D. C. N. Y., 1939).

2 Moore, Federal Practice, sec. 30.03, p. 2577.

Rule 26 is largely patterned on New York procedure with respect to examination before trial. The New York cases make it entirely clear that such examination requires good faith and is limited to the "matters in issue."

Hubschman v. Hornstein, 241 App. Div. 531, 272, N. Y. S. 709, 710 (1934).

In re Dale's Will, 159 Misc. 578, 288 N. Y. S. 564, 566 (1936).

Moreover, despite the limitation imposed by the Court, the plaintiffs did in substance extend their inquiry into the matters stricken from the bill, under the guise of giving the background out of which arose the 1932 recapitalization and the employment of Deeds.* They

* The following matters excluded from the complaint by the orders of June 16, 1937, and June 30, 1938, were inquired into by the depositions taken by the plaintiffs, as shown by the Narrative Statement:

Ownership of B stock, Narrative Statement, Record before the Circuit Court of Appeals, pp. 430-431, 480, 481, 483, 488, 491, 498, 505, 507-508, 510.

150,000 B shares for employees, pp. 431-432, 472, 480, 488-489, 490-492, 498, 499-500.

Original issuance of stock in 1926, pp. 432-434, 471-472, 489, 491-492, 498, 499-500, 505.

therefore were not in any event harmed by the ruling of the Court.

None of the cases cited by Applicants on this point involved Federal Rules of Civil Procedure 26 or 30, any analogous provision, or a situation in which the Court had by previous orders limited the scope of the complaint. Most of them involved the proposition, not before this Court, that a fiduciary cannot make a profit out of a trust estate, particularly by the use of corporate funds for private purposes. The cases are classified in the Appendix hereto (pp. 37-38).

It is submitted that the decision of the Circuit Court of Appeals holding that the trial Court had properly exercised its discretion and that no harm could have resulted to the Applicants from it, was correct and presents no occasion for review, particularly since the Circuit Court of Appeals affirmed the orders limiting the issues.

5.

THE DECISION UPHOLDING THE 1932 RECAPITALIZATION PROPERLY APPLIED THE APPLICABLE MARYLAND LAW.

The decision of this question turns on the particular charter provisions of The National Cash Register Company and the application to them of the Maryland Corporation Law. It is submitted that the Courts below correctly construed the Maryland statutes and correctly applied them to the charter provisions involved.

The 1932 recapitalization of the Company, advised by the board of directors and approved by the vote of the requisite number of shares, effected (II, 86)

1. A reduction in the amount of issued capital stock.

2. "The issuance of 238,000 new shares of Common A stock to the holders of record of Common A stock pro rata, not as a stock dividend, but as a split-up."

3. The amendment of Articles FIFTH and SIXTH of the charter so as to authorize 200,000 shares of Common C stock with the same rights as to dividends, distribution on dissolution and voting rights as the Common A stock, and to be issued in exchange for Common B stock at the rate of one share of C for two shares of B (II, 86).

The question of the reduction of the amount of issued capital stock is not mentioned in Applicants' Brief. It was in any event, conclusively answered by the Courts below (I, 112; III, 11).

With the dismissal of the claim for the cancellation of the 238,000 A shares because of non-joinder of indispensable parties defendant, that question was no longer before the Courts for decision. The trial Court did, however, consider it in connection with the general question of the fairness and legality of the recapitalization and entertained no doubts as to its validity (I, 111). Most of Applicants' attack is against this issue, upon the unfounded assertion that this stock was issued in lieu of accrued dividends. How Applicants or any A shareholders could be harmed by a pro rata split-up is not apparent. Furthermore, the basis upon which the legality of the issuance of the C shares was decided, would likewise be controlling on the validity of the issuance of the 238,000 A shares.

The background of the 1932 recapitalization, the need for it, its fairness, the constituent steps by which it was effected, and its legality, are fully discussed in the opin-

ion of the trial Court (I, 101-113; II, 81-82). The question of fairness, involving only matters of fact, was decided adversely to the plaintiffs by the District Court after a full analysis, and these findings were concurred in by the Circuit Court of Appeals (III, 11). No effort is made by Applicants to point out any error in this ruling nor is this Court referred to any portion of the record which is claimed to be in conflict, or to justify a different conclusion.

On the question of legality the Courts below decided that adequate charter and statutory power existed for the authorization and issuance of the new stock. The applicable statutory and charter provisions are discussed by the Court (I, 107-108). The charter provisions appear in the record (I, 313-322); the statutory provisions (not quoted by Applicants) are set forth in the appendix hereto at pp. .

The gravamen of Applicants' present complaint (Applicants' Brief, pp. 26-29) seems to be that the procedure taken in the recapitalization deprived the plaintiffs of so-called contract rights and, specifically, of the "right" to accrued dividends, for the payment of which on the plaintiffs' theory no surplus existed (Applicants' Motion, p. 5). The Court found that the distribution of 238,000 A shares was an authorized split-up of stock (I, 111; II, 87—Finding 13). There is nothing whatever other than unsupported inferences by plaintiffs' counsel (see II, 38) to justify the statement that this stock was issued in lieu of accrued dividends.

However, even if the effect of the recapitalization were to extinguish accrued dividends or change "contract rights", the Courts' decisions in favor of the legality of

the plan were correct. If an adequate reservation is made, the power to change even contract rights may itself be a "contract right." Certainly since the concurring opinion of Mr. Justice Story in *Trustees of Dartmouth College v. Woodward*, 4 Wh. 518, 712, it has been perfectly clear that a power to affect contract rights can be reserved. Most of the cases cited by Applicants expressly so state, and none of them denies it. Applicants' Brief admits that under Section 28 of Article 23 of the Maryland Code of Public General Laws a corporation may in its charter reserve the right to change the contract rights of shareholders (Applicants' Brief, p. 29). The only question therefore is whether the right was reserved to authorize and issue the shares of stock involved. None of the cases cited by Applicants involved the Maryland statutory provisions or a charter similar to that of the Company. They, therefore, can be of no assistance in determining whether or not under that law and that charter such a reservation was effected.

Section 28 of Article 23 of the Maryland Code provides for charter amendments to accomplish many purposes, including:

> "* * * the classification or reclassification of all or any part of the capital stock; and the making of any other amendment of the charter that may be desired, provided that such amendment shall contain only such provisions as it would be lawful or proper to insert in an original certificate of incorporation made at the time of making such amendment. No amendment of the charter of a corporation shall be valid which changes the terms of any of the outstanding stock by classification, reclassification or otherwise, in the absence of a reservation in the charter of the right to make such amend-

> ment, unless such change in the terms thereof shall have been authorized by the holders of all of such stock at the time outstanding, * * *. The word 'terms' as used in this Section in reference to stock is intended to mean only the contract rights of the holders thereof as expressed in the charter and shall be so construed."

Section 23 of Article 23 permits *"any action"* which can be taken at stockholders' meetings, to be "taken or authorized by such vote of its stockholders or members as may be required for such action by its charter", provided that it is not less than a majority in number of the aggregate number of votes to which the holders of all the shares of all classes in the aggregate outstanding and entitled to vote, are entitled. Under this authorization, Article ELEVENTH of the charter provides that "any action" of stockholders may be taken by the "vote of the holders of two-thirds of the outstanding shares of the Common A Stock and the Common B Stock, considered as a single class."

Article SEVENTH of the charter provides that the Company may upon such vote of two-thirds of the A and B shares, considered as a single class:

> "(b) authorize one or more additional classes of stock, with such designations, preferences, voting powers, restrictions and qualifications as may be determined or authorized by such vote, which may be the same as or different from the designations, preferences, voting powers, restrictions and qualifications of the classes of stock of the Corporation then authorized or issued and outstanding, * * *.
>
> "No holder of any stock of the Corporation shall be entitled as of right to purchase or subscribe for any part of any unissued stock of the Corporation, or any additional stock of any class to be issued pur-

> suant to any increase of the authorized stock of the Corporation, * * * but any such unissued stock or any such authorized additional stock or securities convertible into stock, shall be issued and disposed of in such manner and subject to such terms, restrictions and provisions as may be determined by, and only by, the vote of a majority of the Board of Directors approved or authorized by vote of the holders of two-thirds of the outstanding shares of the Common A Stock and the Common B Stock, considered as a single class, at a meeting called for that purpose."

The charter, therefore, specifically authorizes a new class of stock (such as the C stock) "with *such* designations, preferences, voting powers, restrictions and qualifications" as may be desired, which may be the "same as or different from" those of the A and/or B shares. It directly authorizes the creation and issuance of a new class (C, or any other designation) with the same rights as the Common A stock—exactly what was done. It would have permitted the issuance of a class of stock having priority over the A shares, instead of simple equality with them. Article SEVENTH would also have permitted the same result through the issuance of convertible securities instead of by way of an exchange. Articles SEVENTH and ELEVENTH in connection with Sections 23 and 28 of Article 23 of the Code authorized the adoption of the amendments and the issuance of the shares by the combined vote of the holders of two-thirds of the shares of the Common A stock and Common B stock, outstanding and entitled to vote, considered as a single class. This vote was received (II, 87).

The statement that the decisions below conflict with *Tri-Continental Corporation, et als. v. The Chesapeake*

Corporation, et al., (Circuit Court No. 2 of Baltimore City, The Daily Record, August 17, 1937), is incorrect. Applicants carefully fail to point out the nature of the supposed conflict or to quote from that case any language purporting to establish the point for which they contend. They are not sufficiently familiar with the case even to give a correct citation.* The case was one in which a proposed consolidation was enjoined on the grounds both that the proposed plan was unfair and that it was unlawful. The only relevant portion of the opinion is set out in the appendix (pp. 41-42). From this it is clear that the consolidation attempted to change terms of the preferred stock (reduction of the dividend rate, modification of the cumulative feature and reduction of redemption price), in the teeth of an express charter provision that the powers of directors and stockholders *could not* be "exercised to abrogate or alter any of the terms" of that particular class. It obviously has no bearing on this case in which the charter provisions authorize, not prohibit, the action taken.

No effort is made by Applicants to show how any of the cited cases** are relevant, much less controlling. They

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* The parties are reversed, the name of the Court and of the Judge are incorrectly given and the case is said to have been decided nine days before it was filed.

**Applicants are decidedly less than fair in challenging the statement of the lower Court as to the absence of relevant decisions (II, 8). The Court correctly stated that the precise question "as affected by the Maryland statute" had not been considered in a reported decision of the Maryland Court of Appeals or by a Federal Court, although the question as affected by statutes of other states had been before the Courts. The Judge could have added that the charter provisions in question had never previously been before any Court.

do not purport to consider either the Maryland statute or the charter of the Company. Manifestly cases under different statutory and charter provisions are of no help. None of these cases denies, and most of them expressly recognize, that the right to change terms can be reserved. The question is one of the adequacy of the reservation. A single striking illustration will serve to show the inaccuracy of the generalizations attempted by Applicants. *Keller v. Wilson & Company,* 190 A. 115 (Del. Sup. 1936) held that "vested rights" could not be changed as to particular non-acquiescing plaintiffs, because of lack of what the Court considered to be an adequate charter reservation under the Delaware law. That same Court, however, has explicitly recognized that the holding in the *Keller* case is limited to a right "accorded protection when the corporation was formed and the stock was issued * * *." Where the reservation of a right to change terms exists when the stock is issued, the shareholder is bound thereby. *Federal United Corporation v. Havender,* 11 A. 2d 331, 338, 339 (Del. Sup. 1940).

It is accordingly submitted that the Courts below correctly construed the Maryland statutes and correctly applied the cited charter provisions. The decision on its face is sound and conflicts with no other authority. As it has reference to a specific charter, this decision of the local law affords little or no opportunity for precedent, and does not involve a matter of general interest or importance.

7.

THE DECISIONS OF THE LOWER COURTS CORRECTLY FOLLOWED THE DECISIONS OF THIS COURT ON POINTS 2 AND 3; POINT 5 IS A MATTER OF MARYLAND LAW ONLY.

Applicants as Point 7 claim that there is no decision of this Court which settles or determines the law on the issues raised in their Motion, more especially as to Points 1, 2, 3 and 5. It is difficult to reconcile this with the grounds urged under those particular points as reasons for granting certiorari. Under Point 2, the decisions of the lower Courts are claimed to be opposed "apparently to decisions of this Court". Under Point 3, the decisions below are claimed to conflict with "decision of this Court or with other C. C. A.s."

The decisions below on Point 2 are in accord with the decisions of this Court.

Venner v. Great Northern R. Co., 209 U. S. 24, 33-34.
Quincy v. Steel, 120 U. S. 241, 246.
Dimpfel v. Ohio, etc., R. Co., 110 U. S. 209, 210.

See:

Hawes v. Contra Costa Water Co., 104 U. S. 450, 461.

The decisions below on Point 3 are in accord with the decisions of this Court.

Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 8.
Minnesota v. Northern Securities Co., 184 U. S. 199, 235.
General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 262, 285.

Point 5 involves the construction of the charter of this Respondent, and the corporation laws of Maryland. This specific question has never been presented to the Courts before. For the reasons heretofore advanced it is submitted that the decisions of the lower Courts were correct.

CONCLUSION.

It is respectfully submitted that all the contentions of Applicants are entirely without merit, and that no reason has been advanced calling for a further review of the questions correctly decided below.

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APPENDIX.

2.

THE APPLICATION OF EQUITY RULE 27, FEDERAL RULES OF CIVIL PROCEDURE 23(b), WAS IN HARMONY WITH THE DECISIONS OF THIS COURT, AND OF THE MARYLAND COURT OF APPEALS.

Analysis of Authorities Cited by Applicants.

No analysis of the State citations is made. It is agreed that there is a conflict among the State courts as to the necessity that the plaintiff in a derivative suit must have been the owner of stock at the time of the transaction of which he complains. If the Federal rule requiring such ownership is procedural, it is applicable here and has uniformly been applied without exception. If it is substantive, the Maryland rule is in accord.

The Federal authorities and texts cited by Applicants may be classified as follows:

1. Those which directly apply the rule.

Venner v. Great Northern R. Co., 209 U. S. 24, 33-34.
Quincy v. Steel, 120 U. S. 241, 246.
Dimpfel v. Ohio, etc., R. Co., 110 U. S. 209, 210.
Venner v. Great Northern Ry. Co., 153 F. 408, 411, 418 (C. C. N. Y., 1907).
Hawes v. Contra Costa Water Co., 104 U. S. 450, 461.

2. Those in which compliance with the ownership provision of the rule is shown.

Doctor v. Harrington, 196 U. S. 579, 582.
Krouse v. Brevard Tannin Co., 249 F. 538, 542 (C. C. A. 4, 1918).
Kelly v. Dolan, 218 F. 966, 970 (D. C. Pa., 1914).

Price v. Union Land Co., 187 F. 886, 890 (C. C. A. 8, 1911).

Greer Inv. Co. v. Booth, 62 F. 2d 321 (C. C. A. 10, 1932); 52 F. 2d 857, 860 (D. C. Okla., 1931).

3. Those in which the existence and applicability of the Federal rule to Federal cases is recognized.

Seasongood, Stockholder Suing for Corporation, 21 Harv. L. Rev. 195, 200.

Sykes, Stockholders' Suits, 4 Md. L. Rev. 380, 384.

13 Fletcher, Cyclopedia of Corporations (Perm. ed.) sec. 5981.

4 Cook on Corporations (8 ed.) sec. 737.

4. Those which involved other portions of the rule—e. g., effort to obtain corporate action before bringing suit—where a suitable excuse may be offered.

Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 445, 451-452.

Corbus v. Alaska Treadwell Gold Mining Co., 187 U. S. 455, 465.

Ogden v. Gilt Edge Consol. Mines Co., 225 F. 723, 728 (C. C. A. 8, 1915).

American Creosote Works v. Powell, 298 F. 417, 420 (C. C. A. 5, 1924).

Greer Inv. Co. v. Booth, 62 F. 2d 321, 324 (C. C. A. 10, 1932).

5. Removal cases, holding that where removal is made solely on the ground that a federal question is involved, it is not necessary to show ownership at the time of the transaction of which complaint is made.

Hand v. Kansas City Southern Ry. Co., 55 F. 712, 714 (D. C. N. Y., 1931).

Jablow v. Agnew, 30 F. Supp. 718, 719 (D. C. N. Y., 1940).

6. Cases removed, other than on the ground of a federal question, holding it necessary that ownership at the time of the transaction complained of be alleged.

Jacobson v. General Motors Corporation, 22 F. Supp. 255, 257, 258 (D. C. N. Y., 1938).
Hitchings v. Cobalt Central Mines Co., 189 F. 241, 243 (C. C. N. Y., 1910).
Venner v. Great Northern Ry. Co., 153 F. 408, 418 (C. C. N. Y., 1907).

7. Cases holding that in a bill based on a federal question, allegations of non-collusion and effort to secure action are not necessary.

Ball v. Rutland R. Co., 93 F. 513, 515 (C. C. Vt., 1899).
Lindsley v. Natural Carbonic Gas Co., 162 F. 954, 957 (C. C. N. Y., 1908).

8. The Maryland cases.

Matthews v. Headley Chocolate Co., 130 Md. 523, has been adequately summarized in the Brief, pp. 8-9. The law review article in 4 Md. L. Rev. 380 discusses the divergent State court cases, recognizes that Rule 23(b) is binding on the Federal courts (p. 384), but states it as the "writer's conviction" that the Maryland Court of Appeals in the *Matthews* case did not intend to adopt the Federal rule but was only "following the well recognized principle of estoppel and the principle that the vendee acquires no greater right than those possessed by his vendor." (p. 389)

It would seem to require something more than the "conviction" of a recent law school graduate to overcome the summary statement of Maryland law, reached after an analysis of the conflicting State decisions, that (130 Md. at p. 534):

> "If this was a suit by stockholders, it would seem to us clear that holders of the stock who become such after the transactions complained of took place, should not be permitted to recover against the directors. * * *"*

The cases of *Eshleman v. Keenan*, 187 A. 25 (Del. Ch. 1936) and *Keenan v. Eshleman*, 2 A. 2d 904 (Del. 1938) are cited (Applicants' Brief, p. 22) as holding that the *Matthews* case "was peculiar and that its decision was limited as above stated." These decisions discussed (187 A., at p. 29; 2 A. 2d, at pp. 911, 912) *only* the form of relief proposed by the Court, permitting a recovery payable directly to such stockholders as were not individually barred.

The earlier case of *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, not mentioned in the Maryland Law Review article, had previously by way of dictum anticipated the *Matthews* decision. The Court said (pp. 583-584):

> "* * * In fact, the bill does not allege that any of the present bond or stock holders were the original holders of those securities or that they received them from the defendants or from either of them. Such an allegation has in several cases been held to be necessary to enable a receiver to maintain a suit of this character even when it is free from the other objections existing in the present case. *Dimpfel v. O. & M. R. Co.*, 110 U. S. 209-10; *Robinson v. W. V. Loan Co.*, 90 F. R. 770-2."

As pointed out in the Brief, pp. 8, 9, the *Matthews* case is direct authority that transferees from alleged

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*Peterson v. Hopson, 29 N.E.2d 140 (Mass. 1940), relied on by Applicants (Brief, pp. 22-23) definitely classified Maryland as denying recovery to post-transaction stockholders (29 N. E. 2d at p. 149).

wrongdoers cannot themselves complain of the alleged wrongs.

Surely the dictum in the *Tompkins* case, and the direct holding in the *Matthews* case, justified the Circuit Court of Appeals' conclusion (III, 9) that the "Maryland doctrine is in line with the rule" followed in the Federal courts.

9. Those recognizing that a transferee cannot complain of wrongs alleged to have been committed by a transferor.

Matthews v. Headley Chocolate Co., 130 Md. 523, 532-533, 535.

Seasongood, Stockholder Suing for Corporation, 21 Harv. L. Rev. 195, 197.

Sykes, Stockholders' Suit, 4 Md. L. Rev. 380, 383, 389.

10. Miscellaneous.

13 Fletcher, Cyclopedia of Corporations (Perm. ed.) sec. 5980, and

4 Cook on Corporations (8 ed.) sec. 736

merely cite State authorities holding that a plaintiff need not be a stockholder at the time of the transaction of which he complains. The Federal and State decisions to the contrary are cited in the next succeeding paragraph in each text.

2 Scott, The Law of Trusts, secs. 297A, 282.4, 294.2-295.1

have no ascertainable bearing. These sections deal with suits, notice, and "Various meanings of the term 'value' " in the case of conventional trusts.

3.

THE DECISION REQUIRING REPRESENTATION OF HOLDERS WHOSE SHARES ARE SOUGHT TO BE CANCELLED CORRECTLY APPLIED WELL-ESTABLISHED PRINCIPLES OF LAW.

Analysis of Authorities Cited by Applicants.

As pointed out in the Brief (pp. 14-15) none of the authorities cited by Applicants supports the argument that it was not necessary to join at least a representative group of holders of A shares whose stock the plaintiffs sought to have cancelled. The authorities cited either support the necessity for such joinder, or are not in point upon the question here involved. A further analysis of the cited cases follows:

1. Those which specifically required the joinder of a person whose property interest it was proposed to affect.

Weidenfeld v. Northern Pac. Ry. Co., 129 F. 305, 310-311 (C. C. A. 8, 1904).

Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 8.

Christopher v. Brusselback, 302 U. S. 500, 504-505.

Carson v. Allegany Window Glass Co., 189 F. 791, 809 (C. C. Del., 1911).

2. Those in which all parties against whom relief was sought were actually made defendants.

Greenwood v. Union Freight R. R. Co., 105 U. S. 13.

Rogers v. Hill, 289 U. S. 582, 585-586.

Rogers v. Guaranty Trust Co., 288 U. S. 123, 127, 145, 146, 150.

Southern Pacific Co. v. Bogert, 250 U. S. 483, 487.

Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 8, 14.

Hawes v. Contra Costa Water Co., 104 U. S. 461.

Coombes v. Getz, 285 U. S. 434.

Harvey v. Harvey, 290 F. 653, 657, 661 (C. C. A. 7, 1923).

Greer Inv. Co. v. Booth, 62 F. 2d 321, 324 (C. C. A. 10, 1932) affirming 52 F. 2d 857, 860.

3. Those in which the action was brought by the plaintiff on his own behalf only. In these cases the corporation affected was defendant, so that they could properly be placed in class 2 above. They are apparently cited without realization of this fact, but are in any event irrelevant. The decisions in the trial Court and the Circuit Court of Appeals did not question the right of Applicants to appear as plaintiffs. The decisions in the Courts below turned upon the necessity of joinder of *defendants*, whose property rights were to be affected.

In the following cases suit was brought by the plaintiff in his own behalf only.

Keller v. Wilson & Co., 180 A. 584, 585 (Del. Ch. 1935), 190 A. 115, 117, 125 (Del. Sup. 1936). (There is no foundation whatever for the statement on p. 24 of Applicants' Brief that the Court denied a motion to dismiss, "holding that the other shareholders affected were not indispensable parties and the plaintiff[s] could establish rights for other shareholders similarly situated." As pointed out in *Federal United Corporation v. Havender,* 11 A. 2d 331, 343 (Del. Sup. 1940) a change of rights affecting stockholders can be attacked only by diligent dissenters.)

Yoakam v. Providence Biltmore Hotel Co., 34 F. 2d 533, 535 (D. C. R. I., 1929).

Federal United Corporation v. Havender, 11 A. 2d 331, 333 (Del. Sup. 1940).

4. Those in which, in advance of contemplated corporate action affecting the rights of stockholders as such, injunctive relief was sought. In these cases the corporation was joined as a defendant, and no question of other proper parties, plaintiff or defendant, was involved.

Shanik v. White Sewing Mach. Corporation, 15 A. 2d 169 (Del. Ch. 1940).

Federal United Corporation v. Havender, 11 A. 2d 331 (Del. Sup. 1940).

Patterson v. Durham Hosiery Mills, 214 N. C. 806, 200 S. E. 906 (1939).

Tri-Continental Corporation, et al., v. The Chesapeake Corporation, et al., Circuit Court No. 2 of Baltimore City, The Daily Record, August 17, 1937.

Breslav v. N. Y. & Queens El. L. & P. Co., 273 N. Y. 593, affirming 249 App. Div. 181.

Yoakam v. Providence Biltmore Hotel Co., 34 F. 2d 533 (D. C. R. I., 1929).

General Investment Co. v. American Hide & Leather Co., 98 N. J. Eq. 326, 129 A. 244 (Err. & App. 1925).

Keller v. Wilson & Co., 180 A. 584 (Del. Ch. 1935), 190 A. 115 (Del. Sup. 1936).

Consolidated Film Industries, Inc. v. Johnson, 197 A. 489 (Del. Sup. 1937).

5. Cases holding that the corporation does not represent any class of stockholders in a controversy between different stockholders or different classes of stock.

Weidenfeld v. Northern Pac. Ry. Co., 129 F. 305, 311-312 (C. C. A. 8, 1904).

Harvey v. Harvey, 290 F. 653, 657 (C. C. A. 7, 1923).

6. Cases having no apparent bearing upon the necessity of joining as defendants those whose title to prop-

erty is sought to be affected. Groups 3 and 4 of this Analysis might properly be included here. The following additional cases cited by Applicants, and not otherwise listed above, definitely have no bearing upon the question of joinder of defendants.

Magruder v. Drury, 235 U. S. 106—Residence of decedent; accounting by trustees.

Looker v. Maynard, 179 U. S. 46—Quo warranto—right of legislature subsequently to provide for cumulative voting, recognized.

Miller v. New York, 82 U. S. 478—Quo warranto—right of legislature to change number of directors to be elected by designated stockholder, recognized.

Doan v. Consolidated-Progressive Oil Corporation, 271 F. 12 (D. C. Del. 1920)—In claimed class suit, for purpose of determining diversity of citizenship, members of a class not joining in the complaint are not treated as plaintiffs.

Barclay v. Wabash Ry. Co., 30 F. 2d 260 (C. C. A. 2, 1929) (Rev'd., Wabash R. Co. v. Barclay, 280 U. S. 197)—Question of whether holders of non-cumulative preferred stock could later demand payment before dividends could be paid on common stock out of current earnings.

Commerce Trust Co. v. Chandler, 295 F. 241 (C. C. A. 1, 1924)—Receiver can question validity of mortgage not executed by required corporate action.

American Steel & Wire Co. v. Wire Drawers' etc., Unions, 90 F. 598 (C. C. Ohio, 1898)—Action to enjoin unincorporated associations on strike. Court refused to dismiss as to parties joined but not served, because there would be further opportunity for service.

4.

THE COURTS CORRECTLY LIMITED THE SCOPE OF DEPOSITIONS UNDER RULE OF CIVIL PROCEDURE 30(b).

Analysis of Authorities Cited by Applicants.

None of the cases cited by Applicants involves depositions, or a situation in which the Court had limited the scope of the complaint as originally filed, and was now confronted with the intention of plaintiffs to ignore the effect of such limitation. The cases cited fall within the following classifications.

1. Those which merely hold that a fiduciary cannot make a profit out of the trust estate.

Jackson v. Smith, 254 U. S. 586.
Jackson v. Ludeling, 88 U. S. 616.
Pollitz v. Wabash R. Co., 207 N. Y. 113.
Irving Trust Co. v. Deutsch, 73 F. 2d 121 (C. C. A. 2, 1934).
Tilden v. Barber, 268 F. 587 (D. C. N. J., 1920).
Commonwealth v. Reading Traction Co., 204 Pa. 151. This case also expressly decided that holders of stock were indispensable parties to a suit to cancel their shares.
Peterson v. Hopson, 29 N. E. 2d 140 (Mass. 1940).

2. Those which hold that the rule above stated is particularly applicable to the use of corporate funds for private purposes.

Backus v. Finkelstein, 23 F. 2d 357 (D. C. Minn., 1927).
Guth v. Loft, Inc., 5 A. 2d 503 (Del. Sup. 1939).
Bailey v. Jacobs, 325 Pa. 187.

3. Miscellaneous cases.

United States v. Kissel, 218 U. S. 601. Limitations to an indictment charging a continuing conspiracy must be raised by the general issue plea, not a plea in bar.

Butler v. Watkins, 80 U. S. 456. In an action in deceit, evidence of similar misrepresentations is relevant on the question of animus.

Attorney General v. Pelletier, 240 Mass. 264. On an information to remove a District Attorney, the Court may consider derelictions during a previous term of office.

New England Foundation Co. v. Reed, 209 Mass. 556. Mortgagee not found to have been associated with mortgagor's fraud on builder.

Lantin v. Goodnow, 207 Mass. 291. Liability through adoption, with knowledge, of fraudulent acts.

Big Spring Electric Co. v. Kitzmiller, 268 Pa. 34. Action for purchase price of bonds; inadequacy of consideration.

Sutton v. Sutton, 56 Md. 109. No such case in report cited, or listed in the Maryland Reports.

5.

THE DECISION UPHOLDING THE 1932 RECAPITALIZATION PROPERLY APPLIED THE APPLICABLE MARYLAND LAW.

Excerpts from Article 23, Maryland Code of Public General Laws (1939 edition):

The certificate of incorporation shall state:

"Sec. 4(e) The total amount of capital stock, if any, of the proposed corporation, and the number and par value of the shares; and the restrictions, if any, imposed upon the transfer of the shares. If the capital stock is to be classified under the power

hereinafter granted, the certificate of incorporation shall also set forth a description of each class, with the preferences, voting powers, restrictions and qualifications of each class and the number and par value of the shares of each class.

* * * * * *

"(g) Any provisions which may be desired for the purpose of defining, limiting and regulating the powers of the corporation, and of the directors and stockholders or any class of the stockholders; provided, such provisions are not contrary to the law of this State or inconsistent with any of the terms and limitations of this Article. Any provision which is hereinafter in this Article authorized to be made in the by-laws, may, if desired, be made in the certificate of incorporation."

"Sec. 23. * * * Notwithstanding any provision of law requiring any action to be taken or authorized by the affirmative vote of the holders of a majority or other designated proportion of the shares or of the shares of each class, or by the affirmative vote of a majority or other designated proportion of the members, or to be otherwise taken or authorized by vote of the stockholders or members of any corporation, such action shall be effective and valid if taken or authorized by such vote of its stockholders or members as may be required for such action by its charter; but in the case of corporations having capital stock, the requisite number of affirmative votes shall not in any case be less than a majority in number of the aggregate number of votes to which the holders of all of the shares (meaning thereby all of the shares of all classes in the aggregate) outstanding and entited to vote thereon, shall be entitled, except in cases in which the law authorizes such action to be taken or authorized by a less vote; * * *."

Amendments may be made to accomplish:

"Sec. 28. * * * The addition to or diminution of the corporate purposes and powers, or the substitution of other purposes and powers in whole or in part for those set forth in the charter; the changing of the corporate business; the changing of the corporate name; the changing of the location of the principal office; the increasing of the authorized capital stock by increasing the number of shares thereof and the classification, if desired, of such increase; the decreasing of the authorized but unissued capital stock by reducing the number of shares thereof; the changing of the number and/or par value of shares of the capital stock of any class thereof, provided that the total amount of outstanding stock is not thereby increased; the classification or reclassification of all or any part of the capital stock; and the making of any other amendment of the charter that may be desired, provided that such amendment shall contain only such provisions as it would be lawful or proper to insert in an original certificate of incorporation made at the time of making such amendment. No amendment of the charter of a corporation shall be valid which changes the terms of any of the outstanding stock by classification, reclassification or otherwise, in the absence of a reservation in the charter of the right to make such amendment, unless such change in the terms thereof shall have been authorized by the holders of all of such stock at the time outstanding, by vote at a meeting or in writing with or without a meeting; and in the case of any such change of terms of outstanding stock, the articles of amendment shall, in addition, to other matters required by law, affirmatively set forth that the holders of such stock have duly authorized such change of terms. The word 'terms' as used in this Section in reference to stock is intended to mean only the contract rights of the holders thereof as expressed in the charter and shall be so construed."

"Sec. 44. The charter may provide that shares of stock of any class shall be convertible into shares of stock of any other class upon such terms and conditions as may be therein stated * * *."

"Sec. 47 (2). * * * the board of directors may, by resolution, advise the stockholders to authorize the issuance of certain shares of stock of one or more classes * * * for a certain specified consideration, and call a meeting of the stockholders to take action thereon. The board of directors shall, by resolution, state its opinion of the actual value of any consideration other than money for which it advises that such stock * * * be issued. The meeting of stockholders shall be duly warned * * * and at such meeting, duly called and warned as aforesaid, the stockholders may, by the affirmative vote of two-thirds of the shares of each class of stock outstanding and entitled to vote thereon, authorize the issuance of all or any part of such stock * * * as advised by the board of directors.

"(3) The corporation shall prepare a statement in such form as may be prescribed or permitted by the State Tax Commission * * *."

Tri-Continental Corporation, et als. v. The Chesapeake Corporation, et al., in the Circuit Court No. 2 of Baltimore City (filed August 16, 1937).

(Extract from opinion reported in The Daily Record, Baltimore, August 17, 1937, page 3.)

DENNIS, C. J.—

* * *

"Sections 6 and 7 of the Charter define the rights of the stock and provide 'That no such powers (of directors and stockholders) shall be exercised to abrogate or alter any of the terms of the outstanding Series A Preferred Stock.' Sec. 28 of Art. 23 of the Code of Public General Laws in force in 1929 when

the Alleghany Corporation was organized, provided then, and now, in effect that no amendment of the charter of a corporation shall be valid which changes terms of any outstanding stock without its consent, and by 'terms' is meant the contract rights of the holders as expressed in the charter. Sec. 33 of the Act then in force applied to consolidations the identical provisions found in the Sec. 28 relating to amendments. Therefore it is clear that by contract and statute the minority holders of Class A Preferred Stock, since the consolidation plan alters their existing contract rights, cannot lawfully be required either to trade their stock in accordance to 'the plan' against their will, or to protest and have it appraised."

* * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 476.

BRYANT McQUILLEN, ET AL.,
Petitioners,

v.

THE NATIONAL CASH REGISTER COMPANY, ET AL.,
Respondents.

ANSWER OF THE NATIONAL CASH REGISTER COMPANY TO MOTION AS TO RECORD FOR APPLICATION FOR WRIT OF CERTIORARI.

The motion of Applicants requests that the certified record on appeal from the District Court for the District of Maryland, the record of proceedings in the Circuit Court of Appeals for the Fourth Circuit, Applicants' and Respondents' printed appendices filed in the Circuit Court of Appeals, copies of (extracts from) annual reports of this Respondent, "and such other records, papers and proceedings [not described] as were sent here by the C. C. A. (4) shall be considered as the record for the determination by this court of their application."

Since this constitutes the entire record, with partial duplications, this Respondent has no objection to it being considered as the record.

This Respondent wishes to point out, however, that the record as so constituted has not been printed as required by Rule 38 of this Court. Rule 10(1) of the Circuit Court of Appeals, Fourth Circuit, provides that unless ordered by the court, it shall not be necessary to print the record on appeal from a District Court. The record was not printed for the use of the Court below, although certain portions were printed as appendices to the briefs. The Applicants completely ignored the requirements of Rule 10 of the Circuit Court of Appeals. They did not print the Findings of Fact, Conclusions of Law, or Judgment of the trial Court. They omitted a portion of the opinion of the trial Court on the merits. They did not indicate omissions in the testimony (pp. 131, 134, 148 (three instances), 176, 186, 187, 194, 199, 227, 255, 256, 268, 275). Transpositions occur of pages 288-291. Reference to the pages of the transcript are not given.

This Respondent repeatedly expressed its willingness to attempt to stipulate what portions of the complete record should be printed under Rule 38(8) of this Court. The Applicants have insisted that they were not required to print anything other than the proceedings in the Circuit Court of Appeals.

This Respondent has been served only with Volume III of the Transcript, consisting of the proceedings in the Circuit Court of Appeals, and the extensions of time granted by this Court; and extracts from certain of the Annual Reports. It was showed, but not served with, two other printed volumes, not entitled in this

Court. These consisted of the *Brief and* Appendix of Appellants in the Circuit Court of Appeals, and of the Appendix filed on behalf of all Appellees in that Court. From an examination of Appellants' Appendix it appeared that none of the errors and omissions above mentioned had been corrected, although all of them had been called to the attention of Applicants.

It is submitted that while a proper record was transmitted to this Court, no proper printed record has been prepared, and no proper service has been made upon this Respondent.

Respectfully submitted,

JAMES PIPER,
Counsel for Respondent,
The National Cash Register Company.

R. DORSEY WATKINS,
CHAUNCEY B. GARVER,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 476.

BRYANT MCQUILLEN AND SAMUEL GOTTLIEB,
PETITIONERS,

v.

THE NATIONAL CASH REGISTER COMPANY, DILLON READ & COMPANY, FREDERICK B. PATTERSON, ET AL.

ANSWER OF EZRA M. KUHNS, S. C. ALLYN, WILLIAM HARTMAN, J. H. BARRINGER AND EDWARD A. DEEDS TO MOTION AS TO RECORD FOR APPLICATION FOR WRIT OF CERTIORARI.

The motion of Applicants requests that the certified record on appeal from the District Court for the District of Maryland, the record of proceedings in the Circuit Court of Appeals for the Fourth Circuit, Applicants' and Respondents' printed appendices filed in the Circuit Court of Appeals, copies of (extracts from) annual reports of this Respondent "and such other records, papers and proceedings [not described] as were sent here by the C. C. A. (4) shall be considered as the record for the determination by this court of their application." Since this constitutes the entire record, with partial du-

plications, these Respondents have no objection to it being considered as the record.

These Respondents wish to point out, however, that the record as so constituted has not been printed as required by Rule 38 of this Court. Rule 10 (1) of the Circuit Court of Appeals, Fourth Circuit, provides that unless ordered by the court, it shall not be necessary to print the record on appeal from a District Court. The record *was not printed for the use of the Court below,* although certain portions were printed as appendices to the briefs. The Applicants completely ignored the requirements of Rule 10 of the Circuit Court of Appeals. They did not print the Findings of Fact, Conclusions of Law, or Judgment of the trial Court. They omitted a portion of the opinion of the trial Court on the merits. They did not indicate omissions in the testimony (pp. 131, 134, 148 (three instances), 176, 186, 187, 194, 199, 227, 255, 256, 268, 275. Transpositions occur of pages 288-291). Reference to the pages of the transcript are not given.

These Respondents repeatedly expressed their willingness to attempt to stipulate what portions of the complete record should be printed under Rule 38 (8) of this Court. The Applicants have insisted that they were not required to print anything other than the proceedings in the Circuit Court of Appeals. This is a complete misunderstanding of the meaning of Rule 10 of the Circuit Court of Appeals which was intended to relieve litigants from the burden of printing the record. This beneficent purpose would be defeated if this Court were to rule that only such portions of the record as were printed in the briefs filed in the Court below, could be considered on petition for the writ of certiorari.

These Respondents have been served with Volume III of the Transcript, consisting of the proceedings in the Circuit Court of Appeals, and the extensions of time granted by this Court, with mimeographed extracts of the annual reports of the Company and with two other printed volumes, not entitled in this Court. These latter consisted of the *Brief and* Appendix of Appellants in the Circuit Court of Appeals, and of the Appendix filed on behalf of all appellees in that Court. From the examination of Appellants' Appendix it appeared that none of the errors and omissions above mentioned had been corrected, although all of them had been called to the attention of Applicants.

It is submitted that while a proper record was transmitted to this Court, no proper printed record has been prepared, and no proper service has been made upon these Respondents. Clearly, this is not a compliance with the rules of this Court. These Respondents accordingly reserve the right to insist upon such compliance in the event that the writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. MARBURY, JR.,
Counsel Appearing Specially
for Ezra M. Kuhns, et al.

No. 476

In the Supreme Court of the United States

OCTOBER TERM, 1940.

BRYANT McQUILLEN AND SAMUEL GOTTLIEB,
PETITIONERS,

v.

THE NATIONAL CASH REGISTER COMPANY, DILLON READ & COMPANY, FREDERICK B. PATTERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MEMORANDUM OF EZRA M. KUHNS, S. C. ALLYN, WILLIAM HARTMAN, J. H. BARRINGER AND EDWARD A. DEEDS, IN OPPOSITION.

WILLIAM L. MARBURY, JR.,
Counsel Appearing Specially for Ezra M. Kuhns, et al.

The Daily Record Co. Print, Baltimore.

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MEMORANDUM OF EZRA M. KUHNS, S. C. ALLYN, WILLIAM HARTMAN, J. H. BARRINGER AND EDWARD A. DEEDS, IN OPPOSITION.

This memorandum is filed by counsel appearing specially on behalf of Ezra M. Kuhns, S. C. Allyn, William Hartman, J. H. Barringer and Edward A. Deeds. Each of them is a non-resident of the District of Maryland upon whom substituted service under Section 57 of the Judicial Code (28 U. S. C. 118) was effected outside of the district. Each appeared in the trial court specially and solely for the purpose of moving the court

to limit proceedings under the amended bill of complaint to claims in rem against the stock of The National Cash Register Company. These motions having been granted, they then appeared specially and solely for the purpose of protecting their interest in the stock. After a trial on the merits, a judgment was entered finally dismissing the bill, and on appeal that judgment was affirmed. By filing this memorandum, these respondents do not intend to enter general appearances or to confer any jurisdiction over their persons.

OPINIONS BELOW.

The Opinion of the Circuit Court of Appeals filed on June 10, 1940, is printed in Vol. III of the transcript of the record at pages 3 to 14. (See also 112 Fed. (2d) 877). The District court filed four opinions. The first opinion, filed December 14, 1935, is not included in the record, but will be found reported in 13 F. Supp. 53. The second opinion, filed on July 14, 1936, is printed at pages 75 to 78 of the Appendix to the Plaintiff-Appellant's Brief in the Circuit Court of Appeals (hereinafter called "Appellant's Appendix"). The third opinion filed on March 17, 1938, is printed at pages 80 to 98 of Appellant's Appendix (See also 22 F. Supp. 867). The fourth opinion, filed May 4, 1939, is printed in part at pages 98 to 129 of Appellant's Appendix. The rest of the opinion is printed at pages 81 to 82 of the Appellee's Appendix filed in the Circuit Court of Appeals (See also 27 F. Supp. 639).

STATEMENT.

A. *The Proceedings Below.*

The suit is one brought by two individuals who are holders of 120 shares of stock of The National Cash Reg-

ister Company, a Maryland corporation, against that Company and certain other defendants, all of whom are non-residents of Maryland. The avowed purpose of the suit is to redress alleged wrongs suffered by the Company at the hands of the other defendants.

The original bill of complaint was filed in the District Court for the District of Maryland on July 5, 1934. After proceedings not material here, an amended bill was filed on February 5, 1935. After prolonged consideration, the trial court entered an order on January 7, 1936 for substituted service under Section 57 of the Judicial Code (28 U. S. C. 118) upon certain of the non-resident defendants, including these respondents. (Appellee's Appendix p. 1). The Court refused to order service on the other defendants on the ground that they were not alleged to own or to have any interest in the stock of the Company which was the only *res* claimed to be before the Court (there being no allegation that the Company or the non-resident defendants had any other assets or property within the District of Maryland). See 13 F. Supp. 53.

The Marshal's returns show that personal service was made outside of the district on Lee Warren James, Dillon Read & Company and on these respondents. The return further showed that service was made within the district on the Company. No personal service was made on any other defendant. (R. pp. 121-123,* Appellee's Appendix p. 3).

Lee Warren James and these respondents appeared specially and solely for the purpose of moving to quash

*The typewritten record certified to this Court pursuant to Rule 38, is referred to as "R. p. ".

the service of process made upon them. (R. pp. 126, 127, 128, 129, 130, 131). On February 21, 1936, an order was entered taking the decree *pro confesso* as to Dillon Read & Company, Frederick B. Patterson and C. E. Steffey (Appellee's Appendix p. 4), and on April 3, 1936 a final decree was entered as to the three above named defendants. (Appellee's Appendix p. 5). On June 11, 1936, Messrs. Patterson and Steffey appeared specially and solely for the purpose of moving to strike out the orders of February 21, 1936 and April 3, 1936 on the ground that they were nullities. (Appellee's Appendix p. 7). The petitioners thereupon moved the court to strike out the special appearances of Messrs. Patterson and Steffey and to declare them general appearances. (Appellee's Appendix p. 9).

On July 1, 1936 the court entered orders overruling the petitioners' motion to strike out the special appearances of Patterson and Steffey and rescinding the orders of February 21, 1936 and April 3, 1936, except as to Dillon Read & Company. (Appellee's Appendix pp. 11, 12). On the same day the court entered an order overruling the motions of Lee Warren James and of these respondents to quash service of process upon them. (R. p. 144).

Immediately thereafter Lee Warren James and these respondents, through counsel appearing specially and solely for that purpose, filed identical motions *(mutatis mutandis)* reading as follows: (R. pp. 175, 176, 177, 178, 179):

> "Appearing solely for the purpose of making this motion and not intending to submit himself to the jurisdiction of this court as a party hereto, comes now Lee Warren James, the defendant above named, and moves this court to limit further proceedings

> under the amended bill of complaint filed in this cause to such claims of the complainant as constitute actions in rem against the stock of The National Cash Register Company and to strike from said amended bill of complaint all other claims including all personal claims against this defendant, this being the first opportunity at which the defendant can make this motion."

On June 16, 1937 the court entered its order sustaining these motions. (Appellee's Appendix p. 13). As thus limited, the bill was confined to the following: (1) A claim for the cancellation of 400,000 "B" shares issued by the Company in 1926, and of the "C" or common shares issued in lieu thereof, (2) A claim for the cancellation of the "C" and/or common shares which were issued in lieu of the "B" shares as the result of a recapitalization of the Company in 1932, (3) A claim for the cancellation of the 238,000 "A" shares which were issued to the holders of the "A" shares as a result of the 1932 recapitalization, (4) A claim for a declaration that the option given to the defendant Deeds was null and void and for an injunction against the Company performing the same, (5) A claim for an injunction against the payment of any dividends on the "B" shares and the "C" or common shares issued in lieu thereof, on the 238,000 "A" shares and on the shares covered by the Deeds option.

On June 25, 1937, Lee Warren James and each of these respondents appeared specially and solely for the purpose of protecting any interest which he might have in stock of the Company having a situs within the District of Maryland, and moved the court to dismiss the amended bill of complaint as limited by the order of June 16, 1937,

because of defenses apparent on the face of the bill. (R. pp. 196, 201, 206, 211, 215). The Company filed a similar motion together with a motion for further and better statement. (R. pp. 192, 225).

In September 1937, petitioners filed a petition in the Circuit Court of Appeals for the Fourth Circuit for a rule directed to the district judge, requiring him to show cause why a writ of mandamus should not issue commanding him to set aside and vacate the orders passed by him on July 1, 1936, and June 16, 1937. This petition having been denied (93 F. (2d) 1009), a petition was filed in this Court for writs of certiorari, mandamus and prohibition to the Circuit Court of Appeals which were likewise denied. (303 U. S. 619, 637).

On June 30, 1938, the court entered an order dismissing certain parts of the bill of complaint as previously limited, and directing these respondents and the Company to plead to what was left of the amended bill of complaint within twenty days. (Appellees Appendix p. 19) The effect of this order was to limit the bill of complaint to the following: (1) a claim for the cancellation of the "C" and/or common shares which were issued in lieu of the "B" shares as the result of the 1932 recapitalization, (2) a claim for a declaration that the option given to Deeds was null and void and for an injunction against the Company performing the same, and (3) a claim for an injunction against the payment of any dividends on the "C" or common shares issued in lieu of the "B" shares and on the shares covered by the Deeds option.

Within the allotted time the Company, Lee Warren James, and each of these respondents filed their answers.

(R. pp. 297-401). Each of the answering individual defendants preserved his special appearance and limited his answer to the protection of property subject to the jurisdiction of the court.

On November 10, 1938 on motion of the Company, the trial court limited the scope of examination on depositions to be taken by the petitioners, to matters relating to the transactions dealt with in the amended bill of complaint as limited by its previous orders of June 16, 1937, and June 30, 1938. (Appellants Appendix p. 79).

The case came on for hearing in open court in January, 1939, at which time depositions were introduced in evidence and further testimony taken in open court. On July 13, 1939, the court filed its findings of fact, conclusions of law and judgment dismissing the entire bill of complaint. (Appellees Appendix pp. 82-96).

This memorandum will deal with the orders of July 1, 1936 and June 16, 1937 and with the judgment of July 13, 1939 insofar as that judgment relates to the Deeds option. All other questions affecting the interest of these respondents are sufficiently dealt with in the brief in opposition filed on behalf of the Company.

B. The Deeds Option.

The Deeds option is printed in the Appellants' Appendix at pp. 307-311. After certain recitals, it gave the respondent Deeds the right and option, during the five years commencing July 17, 1932 and ending July 17, 1937, to purchase at $9.80 a share (cost to the Company) with interest at the rate of 4% less dividends, from July 17, 1932 to the date of payment, all or any part of 50,000 shares of Class "A" common stock or a like num-

ber of shares of any class into which said stock might be converted. As to 10,000 shares, the option was exercisable immediately upon its execution. During the year beginning July 17, 1932 and in each of the three succeeding years, an additional 10,000 shares became subject to the option and it was expressly provided that the option should be cumulative. Subject to certain provisions not material here, it was provided that the option should become null and void at any time that Mr. Deeds should be neither an officer nor a director of the corporation.

A full statement of the circumstances surrounding the execution of this agreement will be found in the findings of the trial court. (Appellee's Appendix pp. 89-93). The conclusion was that "the option agreement was given to Deeds in good faith and did not constitute a waste of the Company's assets on the part of the directors in making such an agreement. In view of the qualifications, record and achievement of Deeds, the compensation paid to him did not constitute an abuse of discretion vested in the directors." (Appellee's Appendix p. 93).

The Circuit Court of Appeals, after reviewing the facts, concluded "that this option contract was lawful and proper and that it was based upon a sufficient consideration in the agreement by Colonel Deeds to assume the leadership, and to direct the policies of a great corporate enterprise." (Vol. III Transcript of Record, pp. 3-4).

ARGUMENT.

I.

THE ORDERS OF JULY 1, 1936.

As the petitioners do not contend that the affirmance of these orders presents any question justifying the granting of the writ of certiorari, we do not discuss them further.

II.

THE ORDER OF JUNE 16, 1937.

Petitioners urge review of the affirmance of this order for two reasons (a) because of alleged conflict with decisions of other courts and (b) because of the alleged importance of the questions presented.

(a) Upon examination of the cases cited by petitioners, it will be found that the alleged conflict is confined to a few *obiter* remarks in an opinion delivered by District Judge WOOLSEY. See *Bede Steamship Company v. New York Trust Company*, 54 F. (2d) 658. The claim of conflict with the other cases referred to by petitioners is palpably frivolous. The courts below followed and applied the only case directly in point, i.e. *Grable v. Killits*, 282 F. 185 *cert. den.* 260 U. S. 735.

(b) Undeniably it is of importance to protect litigants from being forced to defend suits *in personam* instituted in districts in which none of the parties are resident, under the guise of actions *in rem* against property having a *situs* within the district. This the order of the trial court effectively accomplished and its affirmance thus presents no question calling for the exercise by this court of its power of review.

III.

THE JUDGMENT UPHOLDING THE DEEDS OPTION.

The ruling of the courts below declining to set aside the option agreement between the Company and the respondent Deeds, is urged as a ground for granting the writ. Petitioners state that this ruling conflicts with applicable decisions of this court and of the Maryland Court of Appeals, as well as the weight of authority.

The contention is completely without foundation. The legal principles applied by the lower courts were of the hornbook type; nor do any of the cases cited by petitioners present any conflict in this respect. The issue is essentially one of fact and the petitioners have failed in any respect to impeach the comprehensive findings of the trial judge which were reviewed and fully concurred in by the Circuit Court of Appeals.

CONCLUSION.

Evaluation of the public importance of this litigation may be aided by consideration of the fact that after six years of litigation, no other of the nineteen odd thousand stockholders of the Company has chosen to associate himself with the petitioners in the prosecution of their claims. The petitioners have offered no intelligible reason why the writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. MARBURY, JR.,
Counsel Appearing Specially
for Ezra M. Kuhns, et al.